CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 72.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER, APPELLANTS,

vs.

JOHN E. ROLLER, INTERVENOR.

FILED AUGUST 3, 1904.

No. 451.

JOHN E. ROLLER, INTERVENOR, APPELLANT,

vs.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER.

FILED NOVEMBER 2, 1905.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

(19,432 & 19,953.)

(19,432.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 332.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER, APPELLANTS,

vs.

JOHN E. ROLLER, INTERVENOR.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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a *Transcript of Record.*

Court of Appeals, District of Columbia, January Term, 1904.

No. 1408.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and BARTOW L. Walker, Appellants,
vs.
JOHN E. ROLLER, Intervener.

Appeal from the supreme court of the District of Columbia.

Filed March 1, 1904.

b Supreme Court of the District of Columbia.

ALLEN C. CLARK and SARAH P. CLARK, His Wife, Complainants,
vs.
SALLIE OSBURN, ALVERDA OSBURN, GRACE Osburn, Mason Osburn, Decatur Osburn, Richard Osburn, Herod Osburn, and Martha Isabella Osburn, Sarah E. Steen and Joseph R. Steen, Her Husband; Elizabeth M. Young, Ruth Hannah Morrow and Jeremiah Morrow, Her Husband; Samuel W. Young, Jane Campbell and James Campbell, Her Husband; Ruth H. Rickey and Matthew C. Rickey, Her Husband; Libbie, or Elizabeth, Smith and A. De Witt Smith, Her Husband; James Ward Scott and Rena R. Scott, His Wife; Corinne L. Scott, James Ward Scott, Jr., Julian Fairfax Scott, Leander Scott and Flora G. Scott, His Wife; Clara Isabelle Scott, William Lee Scott and Rosa P. Scott, His Wife; Leander Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, Martha Scott, Bartow L. Walker and Genevi-ve E. Walker, His Wife; Mary V. Marriott and William H. Marriott, Her Husband, and John E. Roller, Intervener, Defendants.

No. 15141. In Equity.

UNITED STATES OF AMERICA, *District of Columbia*, } ss:

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times

hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill of Complaint.*

Filed November 24, 1893.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK and SARAH P. CLARK, His Wife, Complainants,
against
SALLIE OSBURN, ALVERDA OSBURN, GRACE Osburn, Mason Osburn, Decatur Osburn, Richard Osburn, Herod Osburn, and Martha Isabella Osburn, Sarah E. Steen and Joseph R. Steen, Her Husband; Elizabeth M. Young, Ruth Hannah Morrow and Jeremiah Morrow, Her Husband; Samuel W. Young, Jane Campbell and James Campbell, Her Husband; Ruth H. Rickey and Matthew C. Rickey, Her Husband; Libbie, or Elizabeth, Smith and A. De Witt Smith, Her Husband; James Ward Scott and Rena R. Scott, His wife; Corinne L. Scott, James Ward Scott, Jr., Julian Fairfax Scott, Leander Scott and Flora G. Scott, His wife; Clara Isabelle Scott, William Lee Scott and Rosa P. Scott, His Wife; Leander Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, Martha Scott, Bartow L. Walker and Genevi-ve E. Walker, His Wife; Mary V. Marriott and William H. Marriott, Her Husband, Defendants.

In Equity. No. 15141, Docket 36.

The complainants state as follows:

1. The complainants are residents of the District of Columbia, and sue, the complainant Allen C. Clark in his own right and the complainant Sarah P. Clark in her right as his wife.

2. The defendants are resident as follows: The defendants Sallie, Alverda, Grace, Mason, Decatur, and Richard Osburn, in Clark county, State of Virginia; the defendants Herod Osburn and Martha Isabella Osburn, his wife, in the county of Hamilton, in the State of Tennessee; the defendant Sarah E. Steen and Joseph R. Steen, who are husband and wife, in Highland county, State of Ohio; the defendant Elizabeth M. Young, without the District of Columbia,

but her residence is otherwise unknown to the complainants; the defendants Ruth Hannah Morrow and Jeremiah Morrow, who are husband and wife, in Clinton county, Ohio; the defendant Samuel W. Young, in Adams county, State of Ohio; the de-
2 fendants Jane Campbell and James Campbell, who are husband and wife, and the defendants Ruth H. Rickey and Matthew C. Rickey, who are husband and wife, in Adams county, State of Ohio; the defendants Libbie, or Elizabeth, Smith and A. DeWitt Smith, who are husband and wife, in Sumpter county, State of Florida; the defendants James Ward Scott and Rena R. Scott, who are husband and wife, Corrinne L. Scott, James Ward Scott, Jr., and Julian Fairfax Scott, in the city of Frederick, State of Maryland; the defendants Leander Scott and Flora Scott, who are husband and wife, Clara Isabella Scott, William Lee Scott and Rosa P. Scott, who are husband and wife, William Lee Scott, Jr., Mary P. Scott, Louise Scott, and Martha Scott, without the District of Columbia, but their residences are otherwise unknown to the complainants; the defendants, Bartow L. Walker, Genevi-ve E. Walker, who are husband and wife, in the District of Columbia; the defendants Mary V. Marriott and William H. Marriott, who are wife and husband, in Hardin county, State of Kentucky.

The following named of the said defendants are infants under the age of twenty-one years, namely, Sallie, Alverda, Grace, Mason, Decatur, and Richard Osburn; Corinne L. Scott, James Ward Scott, Jr., Julian Fairfax, Clara Isabelle, and Leander Scott, William Lee Scott, Jr., and Mary P., Louisa, and Martha Scott.

The defendants are sued in their own right, except the defendants Martha Isabelle Osburn, wife of Herod Osburn; Joseph R. Steen, husband of Sarah E. Steen; Jeremiah Morrow, husband of Ruth Hannah Morrow; James Campbell, husband of Jane Campbell; Matthew C. Rickey, husband of Ruth H. Rickey; A. DeWitt Smith, husband of Libbie, or Elizabeth, Smith; Rosa P. Scott, wife of William Lee Scott; Rena R. Scott, wife of James Ward Scott; Flora G. Scott, wife of Leander Scott; Genevi-ve E. Walker, wife of Bartow L. Walker; William H. Marriott, husband of Mary V. Marriott, who are sued as the wives and husbands respectively of those defendants with whom their names are joined with mention of their respective marital relations.

All the defendants are sued in respect of their respective interests hereinafter appearing in and to the certain lands and premises hereinafter mentioned and described.

3. Abraham Young, late of the District of Columbia, died in or about the year 1800, intestate and seized and possessed of, among others, original lots numbered eight (8), nine (9), and ten (10), in square numbered 1028, in the city of Washington, District of Columbia.

4. The said Abraham Young left surviving him as his only heirs-at-law six children, namely, four sons, John, Samuel Wade, Charles, and Richard Young, and two daughters, namely, Susannah Young

who afterwards intermarried with one John A. Sommers, and Elizabeth Young, who afterwards intermarried with one Mahlon Roach. The wife of the said Abraham Young and the wives and husbands of such of his children as are married are all deceased.

5. Upon and after the death of the said Abraham Young,
3 partition was had of all his real estate situate in the District of Columbia, and in such partition the said lots numbered 8, 9, and 10 aforesaid were allotted to his aforesaid son, John Young.

6. The said John Young, son of the said Abraham Young, afterwards died in the year A. D. 1823, unmarried and intestate, leaving surviving him as his only heirs-at-law the others of the aforesaid children of the aforesaid Abraham Young, brothers and sisters of him, the said John Young.

7. Prior to May 1st, 1826, the said Samuel Wade Young died intestate, and the defendants Sallie, Alverda, Grace, Mason, Decatur, Richard, and Herod Osburn, Ruth Hannah Morrow, Sarah E. Steen, Samuel W. Young, and Ruth H. Rickey, among others, are now heirs-at-law of him, the said Samuel Wade Young. The defendant Jane Campbell is the widow of Charles Young, a deceased son of the said Samuel W. Young, and the interests of the defendants Samuel W. Young and Ruth H. Rickey in the premises are subject to the dower right of the said Jane Campbell in the premises. The defendant Elizabeth M. Young is the widow of Alfred Young, a deceased son of the said Samuel Wade Young, and the interests of the defendants Steen and the interest formerly of the certain Laura B. Rothrock, hereinafter mentioned in the premises, are subject to the dower right of her, the said Elizabeth M. Young.

8. By conveyances duly executed and recorded in Liber 1530, folio 408, and Liber 1560, folio 80, of the land records of the District of Columbia (the same being hereby referred to as part hereof), there were conveyed and passed to one John H. Walter and one James W. Denver in trust, as in the said conveyances stated and declared, all of the interests of the heirs-at-law of the said Samuel Wade Young in and to the said lots 8, 9, and 10, aforesaid, except the interests of the certain defendants, heirs-at-law of the said Samuel Wade Young and doweresses as aforesaid in the 7th paragraph hereof above mentioned, and except the interest of one Laura B. Rothrock, another of the heirs of the said Samuel Wade Young. Afterwards the said James W. Denver died, leaving the said Walter surviving trustee in the premises; and thereafter the said Walter, as such surviving trustee, conveyed to one Lydia Hoagland all of the said interests so as aforesaid conveyed to him and the said Denver, by deed dated December 23rd, 1892, duly recorded in Liber 1762, folio 383, one of the land records aforesaid, and the said Hoagland, by deed dated July 17, 1893, and recorded in Liber —, folio —, of the land records aforesaid, conveyed the same to Leta M. Morse, why by deed dated October 5, 1893, and recorded in Liber —, folio —, of the land records aforesaid, conveyed the same to the defendant Bartow L. Walker, the three last-mentioned deeds being hereby re-

ferred to as part hereof; and the said Laura B. Rothrock, heir-at-law as aforesaid of the said Samuel W. Young, by deed dated December 1st, 1888, and duly recorded in Liber 1361, at folio 133, one of the land records aforesaid (the same being hereby referred to as part hereof), conveyed all of her interest in the premises to the complainant Allen C. Clark, who now holds the same.

4 9. Prior to May 1st, 1826, the said Charles Young, brother of the said John Young, aforesaid, died intestate, leaving surviving him as his only heirs-at-law a son, Solon C. Young, and a daughter, Mary C. Young, and the said Mary C. Young afterwards died, unmarried and intestate, leaving as her sole heir-at-law her brother, the said Solon C. Young.

10. Afterwards and on, to wit, October 18th, 1869, the said Solon C. Young, surviving heir-at-law of the said Charles Young and sole heir-at-law of the said Mary C. Young, as aforesaid, by deed duly executed and recorded in Liber T and R 18, at folio 402, one of the land records aforesaid (the same being hereby referred to as part hereof), conveyed all of the interest and estate formerly of the said Charles Young in the premises to one Alfred G. Haley, his heirs and assigns, in and upon certain trusts in and by the said deed stated and declared. The said Haley afterwards died without having executed the said trusts or any of them, and thereafter and on, to wit, September 8, A. D. 1892, one Hardy I. Haley and one Zoe Haley, claiming to be the only heirs-at-law of the said Alfred G. Haley, executed and delivered to the aforesaid Lydia Hoagland a deed conveying to her all of the interest and estate aforesaid, the said deed having been recorded in Liber 1750, at folio 213, one of the land records aforesaid, and being hereby referred to as part hereof. The said Hoagland conveyed said interest to one Leta M. Morse, who conveyed the same to defendant Bartow L. Walker by deeds dated and recorded as hereinbefore recited.

11. The said Elizabeth Roach, in, to wit, the month of August, A. D. 1850, died, a widow, leaving surviving her as one of he heirs-at-law the defendant Libbie, or Elizabeth, Smith.

12. By conveyances duly executed and recorded in Liber 1530, folio 408, and Liber 1560, folio 80, of the land records aforesaid (being the same conveyances in the 8th paragraph hereof above mentioned, and the same being hereby referred to as part hereof), there were conveyed and passed to the said Walter and the said Denver aforesaid, in trust as aforesaid, all of the interests of the heirs-at-law of the said Elizabeth Roach in the premises, except the interest of the defendant Libbie, or Elizabeth, Smith, an heir-at-law of the said Elizabeth Roach as aforesaid, and except also the interests of John T. Roach, William J. Roach, and Thomas Gaskill, others of the heirs-at-law of the said Elizabeth Roach. Thereafter by deeds duly executed and recorded, as in the 8th paragraph hereof above stated and mentioned, the said Walter, as surviving trustee as aforesaid, conveyed all of said interests to Hoagland and Hoagland to Morse and Morse to defendant Walker; and by deeds

duly executed and recorded respectively in Liber 1287, at folio 297 *et seq.*, and Liber 1288, at folios 396 and 397, of the land records aforesaid (the same being hereby referred to as part hereof), all the interests of the said John T. Roach, William J. Roach, and Thomas Gaskill and their respective wives in the premises were conveyed to and are now held by the said complainant, Allen C. Clark.

13. The said Susannah Sommers afterwards, to wit, in the month of March, A. D. 1855, died a widow and intestate, leaving surviving her, as one of her heirs-at-law, the defendant Mary V. Marriott.

14. By conveyances duly executed and recorded in Liber 1287, at folios 288 *et seq.*, 291 *et seq.*, and 295 *et seq.*, one of the land records aforesaid (the same being hereby referred to as part hereof), all the interest and estate formerly of the said Susannah Sommers aforesaid in the premises became and now is vested in the said complainant, Allen C. Clark, save and except the interest therein of the defendant Mary V. Marriott, one of the heirs-at-law of the said Susannah Sommers as aforesaid, the said interest of the said defendant, Mary V. Marriott, being a one-twenty-fifth of the interest and estate so as aforesaid formerly of the said Susannah Sommers in the premises, and the same being in the said defendant by reason of the decree of this court in cause No. 11834, in equity, on its dockets, the record and proceeding in which cause are hereby referred to as part hereof.

15. By conveyances duly executed and recorded, to wit, in the years A. D. 1826, 1838, and 1841, in Libers W. B. 16, folio 259, W. B. 70, folio 355, and W. B. 82, folio 443, of the land records aforesaid (the same being hereby referred to as part hereof), all the interest and estate formerly of the said Richard Young aforesaid in the premises as heir-at-law of his brother, the said John Young aforesaid—that is to say, a one-fifth interest in the said lots aforesaid—became and was vested in one James Ward Scott, late of the State of Maryland, deceased. The said Scott afterwards died, having previously and on, to wit, August 22 A. D. 1868, duly executed his last will and testament so as to pass real estate in the District of Columbia, and the said last will and testament was duly admitted to probate and record in the orphans' court of Baltimore city, State of Maryland, and a certified copy thereof has been filed in the office of the register of wills of the District of Columbia, and the same is hereby referred to as part hereof. In and by the said last will and testament the said James Ward Scott devised all of his real estate to his wife, Leanna Scott, for life, with certain powers, and upon her death to his three sons, William, James, and Leander, for their respective lives, with remainder over to such of their respective issue, (excluding the issue of the said Leander by one Annie P. Taylor, claiming to be his wife) as should attain the age of twenty-one years, with an executory devise over to the said James Ward Scott's heirs, according to the statute of descents of the State of Maryland. The said last will and testament also contained provision for other con-

tingencies, since become immaterial. The said Leanna Scott, widow of the said James Ward Scott, afterwards died without having executed any of the powers in and by said last will and testament upon her conferred. The said William, James, and Leander Scott, sons of the said James Ward Scott, who are still living and with their respective wives, are made parties defendant thereto, have lawful issue living, all under the age of twenty-one years and unmarried,
6 as follows: The defendants Leanna Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, and Martha Scott, children of the said William; Corinne L. Scott, James Ward Scott, Jr., and Julian Fairfax Scott, children of the said James Scott, and Clara Isabelle Scott, daughter of the said Leander Scott, by his lawful wife, Flora Gardner Scott; and the said defendants, William, James, and Leander Scott, are the only heirs-at-law of the said James Ward Scott, according to the statute aforesaid, and the said defendants Scott, children of the said William, James, and Leander, would be the only such heirs in case their respective fathers were now dead.

16. By reason of the minority of certain of the defendants as aforesaid, the provisions of the will of the said James Ward Scott as aforesaid, the numerous and in some instances very small interests therein, and the impossibility of any agreement among the parties interested in the premises, no division of the lands and premises aforesaid among the parties entitled thereto, according to their respective rights and interests, can be made without loss or injury to the said parties; and in order to a partition among the said parties of the said lands and premises a sale thereof is necessary and a division of the money arising from such sale among the said parties according to their respective rights and interests.

The premises considered, the complainants therefore pray:

First. That process may duly issue out of this court to the defendants and each of them, commanding them to appear to and answer the exigency of this bill, answer under oath, however, being hereby waived.

Secondly. That a sale may be decreed and had of the said lots numbered 8, 9, and 10, in square numbered 1028, in the city of Washington, District of Columbia aforesaid, and the money arising from such sale divided among the parties according to their respective rights and interests.

Thirdly. That all necessary orders may be made and proceedings had in the premises as are necessary to the relief hereby prayed; and

Fourthly. That the complainants may have such other and further relief in the premises as the nature of their case may require.

The defendants to this bill of complaint are as follows: Sallie Osburn, Alverda Osburn, Grace Osburn, Mason Osburn, Decatur Osburn, Richard Osburn, Herod Osburn, and Martha Isabella Osburn; Sarah E. Steen and Joseph R. Steen, her husband; Elizabeth M. Young, Ruth Hannah Morrow and Jeremiah Morrow, her husband; Samuel W. Young, Jane Campbell and James Campbell,

her husband; Ruth H. Rickey and Matthew C. Rickey, her husband; Libbie, or Elizabeth, Smith and A. De Witt Smith, her husband; James Ward Scott and Rena R. Scott, his wife; Corinne L. Scott, James Ward Scott, Jr., Julian Fairfax Scott, Leander Scott and Flora G. Scott, his wife; Clara Isabelle Scott, William Lee Scott and Rosa P. Scott, his wife; Leanna Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, Martha Scott, Bartow L. Walker
7 and Genevi-ve E. Walker, his wife; Mary V. Marriott and William H. Marriott, her husband.

ALLEN C. CLARK.
SARAH P. CLARK.

——— ———,
Solicitor for the Complainants.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a notary public in and for the District aforesaid, Allen C. Clark and Sarah P. Clark, his wife, who, being by me first duly severally sworn, do depose and say that they have heard read the foregoing bill of complaint by them subscribed and know the contents thereof, and that the facts therein stated of their own knowledge are true, and those stated on their information and belief they believe to be true.

ALLEN C. CLARK.
SARAH P. CLARK.

HENRY E. DAVIS,
Solicitor for Complainants.

Subscribed and sworn to before me this 21st day of November, A. D. 1893.

[SEAL.] APPLETON P. CLARK,
Notary Public.

Petition of John E. Roller, &c.

Filed January 23, 1894.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

ALLEN C. CLARK ET UX., Complainants,
vs.
SALLY OSBURN ET AL., Defendants.
} Equity. No. 15141, Docket 36.

The petition of John E. Roller respectfully represents unto this honorable court as follows:

1. That he is a citizen of the United States and a resident of the State of Virginia.

2. That he claims the sole ownership of the real estate described in these proceedings and is a necessary and proper party to this suit.

3. That the complainant heretofore exhibited a bill for partition in this court in which your petitioner was a defendant, being cause No. 14468, and that said bill was demurred to by your petitioner and his demurrer sustained and said bill dismissed. Wherefore your petitioner avers that he is entitled to be made a party defendant in this cause and permitted to appear and protect his interests in the subject-matter of this cause.

8 Wherefore he prays that he may be made a party defendant in this cause and permitted to file his answer to the bill exhibited herein, and that he may have such other and further relief as may appear right and proper.

JOHN E. ROLLER,
By Counsel.

MACKALL & MAEDEL,
Sol'rs for Petitioner.

Service of notice of hearing on Thursday, January 25, 1894, accepted.

H. E. DAVIS,
By M. BLAIR.

Order Making John E. Roller Party Defendant.

Filed January 25, 1894.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

ALLEN C. CLARK ET UX. vs. SALLY OSBURN ET AL. } Eq. No. 15141, Docket No. 36.

Upon consideration of the petition of John E. Roller, it is by the court, this 25th day of January, A. D. 1894, ordered that said John E. Roller be, and he hereby is, made a party defendant to the bill filed in this cause, and it is further ordered that he have (20) twenty days in which to appear and plead, demur or answer, as he may be advised.

A. B. HAGNER.

Answer of John E. Roller.

Filed February 13, 1894.

In the Supreme Court of the District of Columbia, Holding in Special Term in Equity.

ALLEN C. CLARK ET UX., Complainants,
vs.
SALLY OSBURN ET AL., Defendants.
} Eq. 15141, Doc. 36.

To the honorable the justice of the supreme court of the District of Columbia, holding a special term in equity:

The answer of John E. Roller to the original bill in this cause filed respectfully shows unto this honorable court as follows:

This defendant, now and at all times heretofore saving and reserving to himself all benefit and advantage of exception which
9 can or may be had or taken to the many errors, uncertainties, and other imperfections in the complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, this defendant, answering, saith:

First. Answering the first paragraph of said bill, this defendant says he admits upon information and belief the allegations of the first paragraph of said bill.

Second. He admits the allegations of the second paragraph of the bill, so far as he is informed and believes, to be true.

Third to fifteenth. He admits the allegations contained in the paragraphs from three to fifteen, inclusive, of said bill to be true, so far as he is informed and believes, saving that he denies that the conveyances set forth in those said several paragraphs, by professing to convey interests in the premises in the bill mentioned and described, did in fact pass any interest, right, or title in and to the same, the said conveyances being made by parties claiming interests in said premises, who, as your respondent believes, were not entitled to such interests.

Sixteenth. This respondent further admits that if the allegations in the bill be sustained and the pretensions of this respondent overturned, then the statement made in paragraph sixteen is, so far as he is informed and believes, true.

Seventeenth. And the defendant, further answering, says that the complainant ought not to be permitted to maintain his bill of complaint in this cause, for the reason that by virtue of a deed from the corporation of Washington to Richard Barry, dated the 6th day of March, 1852, and recorded in Liber J. A. S. 35, folio 224, and

the deeds made thereunder, recorded in Liber 788, folio 240; Liber 1147, folio 289; Liber 1744, folio 394; Liber 1744, folio 395, and Liber 1744, folio 397, of the land records aforesaid, by the heirs of said Barry and others claiming under them, this respondent hath title to the premises in said bill mentioned and described, which, though originally a tax title, is one under which he and those under whom he claims have paid taxes and exercised all the rights of ownership and possession over the said premises for nearly a half century.

The complainants and those under whom they claim, upon the other hand, have failed for nearly three-quarters of a century to pay any attention whatever to the premises or to discharge the obligations resting upon them to pay the taxes due and assessed by the Government under whose protection they have stood.

During this great lapse of time all the officials who might have thrown light upon the transactions involving this property have long since disappeared from the stage of action; the witnesses that could have been called to testify as to the regularity of the proceedings which led up to the sale of the premises for taxes and the conveyance of the same under the tax sale are dead; the papers and records which might have been forthcoming if any assault had been made upon the tax title within a reasonable time, as required by the rules of law applicable in such cases, have long since been lost or destroyed by the ravages of time; the newspapers in which the advertisement- of sales were printed have for the most part fallen into dust and the whole transaction become so obscured that it would be impossible for the court to ascertain with any degree of certainty and precision the facts of any transactions of such an age. In the meantime the city in which the premises are situated has grown in population, and the premises, instead of being a burden as they have been for all these long years past, are now at last valuable and worth looking after, and the complainants, spying out from the records the ancient and abandoned rights of the heirs of John Young, dec'd, and desiring to speculate therein, have secured from a few of them, for a paltry consideration, a conveyance of some small interests in said premises, and are now seeking to assert a claim of title thereto by this suit.

They do not set forth, as the law requires, how they and their grantors came to be so long ignorant of their rights and how and when they first came to a knowledge of the matters alleged in the bill. They do not set out, as they are bound to do, what were the impediments to an earlier prosecution of their claim.

Eighteenth. This respondent, further answering, says that he himself holds the legal title to said premises by virtue of a conveyance from the heirs-at-law of Thomas Beall, of George—, surviving trustee, in whom the legal title aforesaid was vested under a conveyance from the original proprietors, bearing date on or about the 29th of June, 1791, which conveyance to this respondent is of record in Liber 1548, folio 451, of the land records of the District of Colum-

bia, and speaks for itself; which said record is hereby referred to and made a part hereof.

Nineteenth. This respondent, further answering, says that the said complainants had once before instituted their suit in equity in the supreme court of the District of Columbia, number 14468, against the same defendants named in this suit, or their privies, your respondent, however, having also been made a party defendant. Since the former suit certain of the defendants named therein have conveyed their interest in or claim to said property to others, and the grantees in said deeds are made defendants in the present suit, instead of their grantors.

So that the same parties or their privies that are now before the court in the present cause were before the court on the former suit and were bound by proceedings had therein. In said cause your respondent filed a demurrer to the bill, and for causes of demurrer set forth two grounds: first, that said suit for partition should not be maintained until the complainants had first asserted and made good their title to the premises in a court of law, and, second, upon the ground that the complainants and those under whom they claimed had been guilty of such laches in the assertion of their claims to the premises as to preclude them from receiving the aid of a court of equity; and thereupon the complainants filed a joinder in said demurrer, and the court, having heard the arguments,
11 was of opinion and decreed that the demurrer was well taken and should be sustained upon both the grounds of demurrer set forth therein, dismissed the bill, awarded your complainant his costs in that behalf sustained, gave leave to sue out execution therefor, and this decree, which stands today unreversed, in full force and effect, is, as your respondent avers, binding upon all parties and privies, and your respondent here pleads the same in bar of the present suit, and asks the court by its decree to quiet him in his title and ownership of said property, and to enjoin the complainants and all parties to this suit from in any way further asserting title or claim against the premises, and to rebuke them, as being in contempt of the court's opinion and decree.

And this respondent, having fully answered as far as he is informed it is necessary and proper for him to make answer, prays hence to be dismissed with his reasonable costs in this cause most wrongfully sustained.

JOHN E. ROLLER.

Subscribed and sworn to before me this twenty-second day of January, 1894.

A. E. L. KEESE,
Notary Public.

[SEAL.]

MACKALL & MAEDEL,
Sol'rs for Def't John E. Roller.

Amendment & Supplement to Original Bill.

Filed June 12, 1894.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK and WIFE, Complainants,
against
SALLIE OSBURN and Others, Defendants. } Equity. No. 15141.

The complainants, by leave of the court in that behalf first had and obtained, by way of amendment and supplement of their original bill in the above-entitled cause, in view of the making of one John E. Roller, upon his petition, party defendant to the said cause, say that the said John E. Roller, by virtue of certain deeds recorded respectively in Liber J. A. S. 35, folio 224; Liber 788, folio 240; Liber 1147, folio 289; Liber 1374, folio 394; Liber 1374, folio 395, and Liber 1374, folio 397, of the land records of the District of Columbia, claims to have title to or an interest in the certain lots numbered 8, 9, and 10 in the said original bill mentioned. The said supposed title or interest so claimed by the said Roller is a tax-title, so called, purporting to depend upon and arise out of a pretended sale of the said lots by the late corporation of Washington prior to the year A. D. 1852, to wit, in the year 1850. The said pre-
12 tended sale and the proceedings in relation thereto were and are irregular, illegal, and wholly null and void, in that the requirements of law in that behalf were not complied with and were disregarded, especially in that the officer or officers of the said corporation purporting to sell the said lots for taxes did not, within ten days after the supposed sale thereof or at any time, transmit to the clerk of the late circuit court of the District of Columbia for the county of Washington an accurate report, or any report, in writing, certified by the clerk or register of the said corporation, in manner and form as required by section 2 of the act of the Congress of the United States of America, approved February 20th, 1819, and entitled "An act supplemental to an act entitled 'An act further to amend the charter of the city of Washington,'" nor was such report, or any report in the premises, forthwith or at any time recorded by the said clerk, or any one else, among the land records of the said county. Nevertheless the said Roller, by virtue of said pretended tax sale, claims title or interest, as aforesaid, in the said lot, and the true title thereto is clouded by reason of the said claim of the said defendant and the said deeds aforesaid; and the complainants are advised that they are entitled to have the said pretended sale decreed to be null, void, and of none effect, and the said deeds and each of them to be similarly decreed to be null, void, and of none effect and delivered up for cancellation and cancelled.

To the end, therefore, that the said cloud upon the title to the said lots may be removed and the full value thereof realized at the sale in the said original bill prayed, the complainants—

Pray, in addition to the prayers in the said original bill contained, as follows, namely:

That the said supposed tax title of the said John E. Roller may be decreed to be null and void, and that the conveyance in relation thereto and in connection therewith may be decreed to be delivered up for cancellation and cancelled, and that the said Roller and all other persons claiming under him may be forever enjoined from setting up any claim under or by virtue of the said conveyances or any of them.

HENRY E. DAVIS,
Sol'r for Compl'ts.

Endorsed.

Leave is given to file this amendment and supplement to the original bill this 12th day of June, A. D. 1894.

W. S. COX, *J.*

13 *Plea and Answer of Defendant.*

Filed November 24, 1894.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK and WIFE
vs.
SALLIE OSBURN ET AL. } Eq. No. 15141.

The answer of John E. Roller to the amended and supplemental bill exhibited in this cause.

To the honorable the justice of the supreme court of the District of Columbia:

This defendant for plea to said amended and supplemental bill says:

That the said plaintiff impleaded the defendant in a suit in equity for the same identical relief prayed in and by said amended bill in this cause, which said suit in equity is No. 14468 in the supreme court of the District of Columbia, and such proceedings were thereupon had that said cause was decided in favor of this defendant, and said relief therein and herein prayed by the plaintiff was denied and said equity suit dismissed at plaintiff's costs.

And this respondent for answer to said amended and supplemental bill adopts his answer to the original bill filed in this cause, and

prays that the same may be taken and considered as his answer to said amended and supplemental bill, as well as to said original bill.

And, having fully answered so far as he is advised it is material and necessary for him to answer, prays to be hence dismissed with his costs, in this behalf most unjustly sustained.

JOHN E. ROLLER,
By D. S. MACKALL, *Counsel.*

MACKALL & MAEDEL,
Sol'rs for Def't John E. Roller.

Replication.

Filed January 21, 1895.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX.
vs.
SALLIE OSBURN. } Equity. No. 15141.

The complainant joins issue with such of the defendants in the above cause as have answered and will hear the case on the bill, amended and supplemental bill, and answers and proofs to be taken.

LEO SIMMONS,
Solicitor for Complainants.

14 *Testimony on Behalf of Walker.*

Filed January 13, 1896.

In the Supreme Court of the District of Columbia, Holding an Equity Court for said District.

CLARK
vs.
OSBORN, CAMPBELL, ET AL. } Equity. No. 15141.

DISTRICT OF COLUMBIA, *To wit:*

Be it remembered that at an examination of witnesses, begun and held on the 3rd day of August, 1895 when the within depositions were taken, I Mason N. Richardson an examiner-in-chancery, did cause to be personally present Bartow L. Walker, to testify for and on behalf of himself, with due and sufficient notice to counsel for all parties.

MASON N. RICHARDSON,
Examiner-in-Chancery.

15 WASHINGTON, D. C., *August 3rd*, 1895—11 o'clock a. m.

Met pursuant to agreement of counsel, at the law offices of Leo Simmons, Esq., to take testimony for and on behalf of respondent, Bartow L. Walker.

Present: H. E. Davis, Esq., Leo Simmons, Esq., for Bartow L. Walker. Mr. Mackall, for John E. Roller. Mr. Richardson, examiner and witness,

Whereupon BARTOW L. WALKER, a witness of lawful age, being by me first duly sworn according to law, for and on behalf of himself, testified as follows:

By Mr. SIMMONS:

Q. Mr. Walker are you a defendant in the case, known as Clark against Osborne, and others, relating to lots 8, 9 and 10, in square 1028? A. Yes, sir.

Q. You purchased an undivided interest in that property did you not? A. Yes, sir.

Q. Do you know when it was? A. About a year and a half ago.

Q. Who did you purchase from, Mr. Walker? A. I purchased from Leta Morse, through John H. Walter, agent.

Q. Mr. Walker, there has been some question raised by the defendant, Roller, about the consideration paid for the interest you own in that land, I wish you would state as near as you can,

16 what you paid for it? A. I paid $7620. for the property.

Q. That is for the undivided interest you own? A. Yes, sir.

Q. Did you visit that property before you purchased it? A. Yes, sir.

Q. What condition did you find it? A. I found it in the possession of the parties from whom I purchased, and in a good condition.

Q. Was it enclosed? A. Yes, sir; enclosed.

Cross-examination.

By Mr. MACKALL:

Q. What relation are you to Mr. John H. Walter? A. No blood relation, just a friend.

Q. Are you connected with him in any way by marriage? A. No sir; except through his brother who married my sister.

Q. His brother married your sister? A. Yes, sir.

Q. You are a great friend of his you say? A. Yes, sir; a good friend.

Q. How long have you been a friend? A. When I first met him, in the Signal Service, I think it was in 1883.

Q. What are your business relations with Mr. John H. Walter?

A. There are no business relations between him and myself, except the business relations between me and any other parties.

17 Q. Have you and Mr. Walter not been engaged somewhat in the real estate business together in this city? A. Yes, sir.

Q. You say you purchased this property from Leta Morse. A. Yes, sir.

Q. What interest did you purchase in that property? A. I supposed the interest I was purchasing, as I looked upon it was one half.

Q. Do you not know what interest you purchased? A. Yes sir; about one half.

Q. That is as near as you can come at it? A. Yes, sir.

Q. Is it not true that you le-t the matter entirely in the charge of Mr. John H. Walter? A. I do not know what matter you refer to.

Q. I mean the matter of the purchase of this property? A. No, sir; I am a *bona fide* purchaser myself.

Q. That was not the question Mr. Walker. A. Yes, sir.

Q. The question is, did you not leave the matter entirely in the hands of Mr. John H. Walter? A. Why, no, sir. If I am a *bona fide* purchaser I could not.

Q. Who is Leta Morse? A. She is a young lady here, engaged in the position of typewriter and stenographer, and a notary public.

Q. At the time you purchased where was her office? A. Fourteen—I do not know where John H. Walter's office is now. Do you remember the number?

18 Mr. SIMMONS: You can state that she was with Mr. John H. Walter.

A. Well, I will state that.

Q. She was a clerk in Mr. John H. Walter's at the time of the purchase? A. Yes, sir.

Q. You bought the property from her did you? A. Yes, sir.

Q. And paid $7620 for it? A. Yes, sir.

Q. Did you pay that in cash? A. I paid $4500 in cash.

Q. Well—— A. And the balance was paid in Garret Park Association stock, which I had recently purchased at the rate of $40.00 a share, that would make up the difference.

Q. Then you paid $4500 in cash, and the balance in stock? A. Yes, sir.

Q. Did you draw your check for that $4500 or did you hand it to Miss Morse in cash? A. No, sir; I did not draw my check for $4500.00.

Q. How did you pay it? A. Why there was three payments on that check, $4500. One was on account of $2500 of a note, which I had—which Walter owed me, and the one was a thousand dollars deposited, and the other check $1000.00, when sale was consummated.

Q. Wait a minute—now did I understand you then that Mr. Walter owed you $2500? A. Yes, sir.

19 Q. That left $2,000? A. Yes, sir.

Q. And how did you pay the $2,000? A. Paid it by check.

Q. Paid it by check to Miss Morse, did you? A. I do not remember how that checks were drawn now.

Q. Have you your check book? A. Yes, sir.

Q. Will you produce the stub of that check? A. No, sir; I could not produce it, because there are so many checks, and so many stubs, that I would not like to go over that work.

Q. That is your only reason for not producing it? A. Yes, sir; that is the only reason.

Q. You have had your bank account settled since then have you? A. Yes, sir.

Q. And you have that old check in your possession some where? A. Yes, sir.

Q. Do you decline to produce that check? A. No sir, oh no, sir.

Q. Will you produce it? A. No, sir; I do not know any necessity for it, because it is laid up with a large amount of other checks, and I would not like to run over about twelve or fifteen hundred other different checks.

Q. You swear that check was made payable to Miss Leta Morse? A. No, sir; I will not because I do not remember.

Q. On the contrary do you not know that it was not made
20 to her? A. No, sir; I do not suppose that it would make any difference as to who that check was made payable to, if it was made payable to any one.

Q. That is not the question. Do you not, know that you never made her a check for $2,000? A. No, sir.

Q. You do not know whether you did or not? A. No, sir; I do not remember at present.

Q. Did you hand her the stock that you speak of—to Miss Morse? A. No, sir.

Q. Who did you hand it to? A. Handed it to Mr. Walter, agent.

Q. Was it transferred to Miss Morse? A. No, sir; those stocks were always signed in blank, all those stocks.

Q. You signed it in blank, and handed it to Mr. Walter. A. Yes, sir.

Q. At the time of this purchase, did Mr. John H. Walter turn over to you this note for $2500 the note of yours, that you say he held?

Mr. SIMMONS: He did not say a note of his.

Q. He says that he held a note.

Mr. SIMMONS: John H. Walter's note.

Q. Did you turn over the note of John H. Walter for $2500 which you say entered into the purchase money to Mr. Walter? A. Yes, sir; I think I did.

Q. Do you know whether you did or not? A. I am pretty certain, yes, sir.

21 Q. Are you willing to swear that at the time of this transfer, you gave John H. Walter or Leta Morse a check for $1,000 on account of this purchase? A. Yes, sir.

Q. That is all the money you have ever paid on account of this purchase, as I understand from what you said?

Mr. SIMMONS: He said that he paid $7620.

Q. I understand that, but that is all the money you paid? A. No sir, I said about $4500 cash.

Q. $2500 of that was a note, of Mr. Walter, which you held? A Yes, sir.

Q. Was it not? A. Yes, sir.

Q. And the other $2,000. was given by checks? A. Yes, sir.

Q. Mr. Walker is it not true that when you made this purchase that you knew that Leta Morse was not buying this property for herself, but for Mr. Walter?

Mr. SIMMONS: I object to that question as not being relevant, and as immaterial, and incompetent.

A. I was buying the property.

Q. Is it not true that when you made this purchase that you knew that Leta Morse was not selling this property, for herself, but for Mr. Walter? A. No sir, I do not know anything about that.

Q. All your negotiations were with Mr. Walter were they not? A. Yes, sir; as agent you know.

22 Q. You say you visited this property before you purchased it? A. Yes, sir.

Q. Who went with you? A. Mr. Walter.

Q. How long before you purchased it? A. I suppose about two weeks.

Q. You were familiar with the property before that were you not? A. The location, yes, sir.

Q. Well, did you not know all about it? A. No, sir; I knew nothing about it.

Q. Were you not interested with Mr. Walter in purchasing what is known in the District as the Young title? A. I do not think that that has got anything to do with this question.

Q. You can answer that question or not as you please? A. I will not answer that question.

Q. Were you not interested with Mr. Walter in purchasing what is known in the District as the Young title?

Mr. SIMMONS: I would suggest that you qualify your question by stating what Young. There are a great many Youngs and ask him which one, and probably he would answer.

Q. I will ask my question as I have stated it. A. That is one reason why I can not answer a question of that kind. You should ask me which Young you mean. There are several Youngs.

Q. Were you not interested with him in purchasing the interest

of some of the Young heirs to property in this District? A. Yes, sir.

23 Q. You were therefore familiar with the history and condition of the title of the Young heirs to property in this city, were you not? A. That is rather a problem for me to answer.

Q. I just want the general condition. A. The only way I could familiarize myself with any particular property as purchased by the Young heirs, would be by the title company, in the District, certifying as to the title to that particular property.

Q. If you listen to that question, I think you can answer it a little more definitely. The examiner will please repeat that question.

EXAMINER: You are therefore familiar with the history and condition of the title of the Young heirs to property in this city, were you not—I just want the general condition?

A. Well, I have answered the question.

Mr. SIMMONS: He said that he did not know the general condition, did he not?

Mr. MACKALL: No, sir; he did not. He says that he has answered that question. Just put that down.

Mr. Walker, are you an officer of the Washington Real Estate Company? A. No, sir.

Q. Were you ever an officer of that company? A. Yes, sir.

Q. What was your position? A. Director.

Q. When did you cease to be a director? A. I think in 1889.

Q. Was not John H. Walter president of that company? A. Yes, sir.

24 Q. Who was the secretary? A. W. Mosby Williams.

Q. Is it not true that John H. Walter, B. F. Leighton, John Ridout, Wm. Williams, Jared O. Nichols, Leo Simmons, and yourself, were directors of said company?

Mr. SIMMONS: I object to that question as being immaterial and irrelevant.

A. Well, what do you want me to do.

Mr. MACKALL: Well, you have to answer it.

Mr. SIMMONS: You can answer or not; it has nothing to do with the case at all.

A. You know some of the directors that are mentioned; whereas others in there are not mentioned, besides there are some in there really that I never met.

Q. That is not the question.

Mr. SIMMONS: We will admit that those are the directors or were at the time you speak of.

Q. Please state who were the directors if those were not the directors?

Mr. SIMMONS: We have admitted that those were the directors then. He said that some were and some were not. There were changes.

Q. Who was Lydia Hoagland?

Mr. SIMMONS: I object to that question, being irrelevant.

A. I do not know anything about her.

Q. Do you not know anything about her? A. No, sir.

Q. Ever hear of her? A. Oh yes, sir.

Q. In what connection did you ever hear of her? A. As a real estate broker, who would appear in a transfer on the records, of the District of Columbia, in the conveyance of a piece of real estate from one party to another.

Q. That is the only way you ever heard of her? A. Yes sir; that is the only way.

Q. Do you know where she is now? A. I do not know, sir.

Q. Where was she at the time you bought this property? A. I do not know.

Q. Was she not connected with Mr. Walter in some way? A. I do not know.

Q. At one time? A. I do not know anything about that, sir.

Q. When you purchased this property did you have the title examined? A. Yes, sir.

Q. Did you know that Mr. Allen C. Clark had purchased this property at a tax sale? A. Just as the records will show, I believe I had a certificate of title, and looked over it.

Q. You believe that you did? A. Yes, sir.

Q. Do you know whether you did or not? A. Yes, sir.

Q. Were you not aware of the fact that Mr. A. C. Clark had purchased this property at a tax sale? A. Yes, sir.

Q. Did you ever redeem that property from that tax sale? A. No, sir.

Q. Did you ever pay any taxes on this property? A. No, sir.

Q. Why did you not redeem the property from this tax sale? A. Because it was not necessary; the tax title would have been void any way, and was of no consequence to me.

Q. The tax title being void, did not, render the taxes void, did they? A. Yes s.r; as far as regards me—or my paying of them.

Q. Do you mean to say that you could take this property without paying the taxes on them? A. If somebody else paid them for me, I do not think that I would have to pay him back, for the reason that he had purchased the property at a tax sale.

Q. You never discussed this question then with Mr. Clark? A. No, sir.

Q. You never paid any taxes on this property from the time that you purchased it to the present time? A. No sir; I have not had time yet. We all of us are sometimes slow in paying taxes, on a

piece of property, and that failure of paying taxes on this particular property was no reason why I would not pay it on any others.

Q. You said that you went out to look at this property and you found that it was in the possession of the person from whom you bought? A. Yes, sir.

27 Q. Do you mean to say that Leta Morse had possession of this property? A. Yes, sir.

Q. Was she living out there? A. Now Mr. Mackall, you ask me questions there that I would have to familiarize myself with. I purchased this property as I told you from the beginning from Leta Morse, through John H. Walter, and there is a lot of questions there which you ask me, which I will have to go over, and familiarize myself with.

Q. I call upon you to state what you know. You have already testified that when you went out there, to examine this property, it was in the possession of the person from whom you bought? A. Yes, sir.

Q. I want to know whether you found her in the possession of the property, when you went out there? A. She was undoubtedly in possession.

Q. In what way? A. For instance, a man might be in the possession of this house here——

Q. I ask you to explain whether you found her in possession, distinctly. A. Yes, sir.

Q. You found her on the ground? A. Yes, sir; found her in possession.

Q. You found her on the ground? A. Through her agent—I purchased the property through her agent.

Q. I know you did. A. Yes, sir.

28 Q. I want to know, however, whether the owner of the property was in possession, and if so, how she was in possession? A. She was in possession by actual sign or indication that she was.

Q. What do you mean by that? A. Well, there was a fine fence, built around there a board fence, which was an indication of possession.

Q. It did not indicate who was in possession, though, did it? A. Yes sir; it was an indication that the owner being in possession.

Q. Well it did not indicate who was the owner of that fence, it did not indicate in any way who was the owner of that property? Yes, sir.

Q. How? A. *Thorugh* John H. Walter as her agent.

Q. You mean what she told you? A. Yes, sir; it was the agent.

Q. There was no other indication of who was the owner of that property except what John H. Walter told you was there? A. Well, that was ownership enough. That was indication enough.

Q. I know; but that was all was it? A. That was all.

Q. Are you the same Bartow L. Walker who was engaged in buy-

ing numerous pieces of property in this city at sales of land for delinquent taxes?

Mr. SIMMONS: I object to that question and state that the
29 witness need not answer it. It is immaterial and irrelevant.

A. I do not know how to answer a question like that.

Mr. SIMMONS: You do not need to answer that question. Now, you can refer it to the court if you want to. I will state further that the witness may answer the question of course if he wishes to, but being entirely irrelevant, and as such, I think it is unnecessary to have an answer.

EXAMINER: Will you answer the question?

A. I have purchased property at tax sales.

Q. You have already testified, I believe that you are the same Bartow L. Walker, who was associated with Mr. John H. Walter in looking up the heirs and buying them out—the Young heirs? A. No, sir; I did not make any such testimony. I did not give any such testimony.

Q. You did not? A. No, sir.

Q. Well, is that true or not? A. If you would modify your question, I might answer that question in this way, that up to a certain time so far as the Young heirs were concerned or a branch of the Young heirs, I should say, that I had purchased a half interest or an interest from Mr. Walter, that he had acquired from one of the Young heirs, in the property in the District of Columbia.

Q. Did you not know that at the time you purchased this property or did you not know at the time you purchased this property through Mr. John H. Walter that a short time prior to that date, he held this property as trustee for some of the Young heirs?

Mr. SIMMONS: I object to that question as being irrelevant and immaterial.

30 A. No, sir, I do not know anything about that.

Q. You have no knowledge of that fact that Mr. Walter was at one time trustee for a lot of property here for the Young heirs, is that your answer? A. Yes, sir; I have knowledge *that* of the fact that he was appointed trustee, of certain interests of the Young heirs.

Q. Did you not also know that the property involved in this suit was a part of the property for which he was trustee? A. No, sir; I do not remember that.

Q. Are you the same person—are you the same Bartow L. Walker, who is named as one of the defendants in the case of William Cox, and others against John H. Walter, and others equity No. 11,637? A. Yes, sir; I do not, remember the equity number.

Q. You remember that case? A. Yes, sir.

Q. Are you the same Bartow L. Walker, who was one of the complainants in the case of John H. Walter and others against Tracenia Bevans?

Mr. SIMMONS: I object to that question as entirely immaterial.

Q. Equity number 10826? A. I will not answer that question. The reason why, I do not—I do not remember.

Q. Where is Leta Morse at the present time? A. I do not know, sir.

Q. Was not Lydia Hoagland a typewriter or clerk at one time in the office of John H. Walter? A. I do not know.

Q. Do you recollect the case of Clark *vs.* Lydia Hoagland, a partition suit?

31 Mr. SIMMONS: I object to that question as being irrelevant and immaterial and incompetent.

Q. For the purpose of dividing this property among the parties to the cause? A. No, sir; I do not remember it.

Q. When you purchased this property was not your attention called to that case? A. I do not remember that.

Q. At the time that you purchased this property did you not know from the records that John Roller claimed to be the owner of this property?

Mr. SIMMONS: I object to that question as being irrelevant and immaterial and incompetent.

A. I do not know anything about that.

Mr. MACKALL: Now I call upon the witness to produce the check for $1,000 which he alleges he gave as a part of the purchase money for this property.

A. Well, I will not do it on general principles.

Mr. MACKALL: He says he will not do it on general principles.

A. No sir; I will not.

Re-direct-examination.

By Mr. SIMMONS:

Q. How long has it been since you were engaged in business with Mr. John H. Walter? A. Since 1889.

Q. That is, your partnership ceased in 1889? A. Yes, sir; I think it was in 1888 or 1889. I am quite sure.

Q. You have been asked, if you left the question of pur-
32 chasing this property entirely in the hands of Mr. Walter, how about that. Did you employ any one else? A. Yes, sir; I employed others.

Q. Did you have the title examined? A. I did.

Q. Did you understand you were getting a good title in the property to the interest you purchased? A. Yes, sir; subject to a tax title.

Q. What was said about that tax title in your report?

Mr. MACKALL: I object to the witness stating the content of a report, which was in writing?

A. It said it was void.

Q. You can answer the question? A. The tax title was void.

Q. You have stated that you paid parts of this purchase money in stock. What did you pay for that stock?

Mr. MACKALL: I object to that question as immaterial and irrelevant. The question is what was the stock worth.

A. $40.00 a share.

Q. How much did you pay in a lump sum for the amount of stock you gave for the property in part of the purchase money? A. $3120.00.

Q. What was the value of the stock at the time you paid it in part purchase for the property? A. $45. a share.

Q. What would that amount to in a lump sum? A. About $4000.00, I think.

Q. What is the value of that stock, on the market today do you know?

Mr. MACKALL: I object to that question as immaterial and irrelevant.

A. It is worth par.

33 Q. What is par? A. $40.00.

Q. Has it paid a dividend lately? A. Yes, sir.

Q. The note that you say you turned over to John H. Walter what did you pay for that note? A. $2500.00 (twenty five hundred dollars).

Q. In cash? A. Yes, sir.

Q. You understood at the time that you purchased this property that you were buying an undivided interest did you not? A. Yes, sir.

Q. Was it or not for that reason that you refused to pay the taxes?

Mr. MACKALL: I object to that question as leading, and as being immaterial and incompetent, and for the further reason that the witness has already given his reasons why he did not pay the taxes.

A. At the time the question was asked by Mr. Mackall, I never thought of the point also there, but that was really one reason why I could not afford to pay those taxes, and also for the reasons I have already stated.

Q. Did you have anything to do with the looking up of any of the heirs of any of the Youngs? A. No, sir.

Q. The interest that you owned in the Young title, was it purchased directly from them, or from the purchaser from them? A. From the purchaser from them.

Q. In the case the attorney for the defendants has men-

34 tioned, the Samuel Cox case, what became of your interest in that cause, was it sustained in the court or not?

Mr. MACKALL: I object to that for the reason that the proceedings of the court are the best evidence.

Mr. SIMMONS: Then you had not any right to ask about the case at all.

A. Sustained in court.

Q. At the time you purchased this property, and went to look at it, did the agent of Leta Morse state that that possession was hers?

Mr. MACKALL: I object to the question as leading.

A. He did.

Re-cross-examination.

By Mr. MACKALL:

Q. At the time of this purchase by you, was that stock in your name on the books of the company? A. Yes, sir; and now I think it was—I do not—it might have been—there was some; there was others might not have been.

Q. From whom did you purchase that stock? A. From various holders of the stock. There was quite a number of holders, scattered around and the stock was purchased from them.

Q. Can you give the names of any of them? A. No sir; I do not remember.

Q. You say you paid $40. a share for the stock? A. Yes, sir.

Q. How many shares did you have, did you turn over to Mr. Walter? A. 78.

Q. 78 shares? A. Yes, sir.

35 Q. You have testified on re-direct examination that Mr. Walter told you that Leta Morse was the owner of this property is that so.

Mr. SIMMONS: I object to that question as it has been answered once, and it is not proper re-cross.

A. I think I have answered that question before.

Q. You can answer it again.

Mr. SIMMONS: I would like further to object to that on the ground that the record shows the title as it stood, and any statement made by another party, who owned the title would have no effect.

A. When ever I purchase a piece of property through an agent, I never go into details of finding out who the owner of the piece of property is. That is a matter that is left entirely with the record, and with the certificate of title and with the owners.

Q. You have testified on re-direct examination that Mr. Walter told you that Leta Morse was the owner of this property is that so (Question repeated.) A. As I have said, I have answered that question up there, above.

Q. Do you decline to answer that question; yes, or no? A. I answered the question further down below.

Q. The question is do you decline to answer the question yes, or no? A. Well, I shall refuse to answer any such question as that.

Mr. MACKALL: That is all.

BARTOW L. WALKER.

Subscribed and sworn to before me this 11th. day of January, 1896.

MASON N. RICHARDSON,
Examiner in Chancery.

36 At time of signing his deposition witness produces to examiner statement and three check-, which he desired to offer in evidence as being the checks referred to in his evidence, and the same are hereupon marked Exhibits M. N. R. A, B, C, & D.

Mr. SIMMONS: That is all my case.

MASON N. RICHARDSON,
Examiner-in-chancery.

EXHIBIT A.

No. —. WASHINGTON, D. C., *Oct.* 5″, 1893.

Second national bank (Bank stamp.)

Pay to the order of Jno. H. Walter, one thousand dollars.
$1000#

B. L. WALKER, *Trustee.*

Endorsed: Jno. H Walter. (Bank stamp.)

EXHIBIT B.

No. —. WASHINGTON, D. C., *Oct.* 12, 1893.

Second national bank (Bank stamp.)

Pay to the order of Jno. H. Walter one thousand dollars.
$1000#

B. L. WALKER, *Trustee.*

Endorsed: Jno. H. Walter. (Bank stamp.)

37 EXHIBIT C.

No. —. WASHINGTON, D. C., *May* 31, 1893.

Second national bank

Pay to the order of Jno. H. Walter two thousand nine hundred & 40/100 dollars.

$2940

B. L. WALKER.

Endorsed: Jno. H. Walter. (Bank stamp.)

EXHIBIT D.

Cost of lots 8–9–10—sqr. 1028:		Paid by check—	
Note of J. H. Walter May 31/93...	$3000	May 31/93.....	$2900.40
Credit on said note	500	Check	39.60
	$2500		$2940.00
		Discount.....	60
			3000.00
		Less.....	500
		Credit on note...	2500
Cost of above property.....			$7620

Paid as follows from—

Balance due on above note.....	$2500
Check Oct. 5/93.....	1000
" " 12/93.....	1000
78 shares of Garrett Park Association stock @ $40.....	3120
	$7620

Checks herewith.

B. L. WALKER.

38 *Stipulation.*

Filed December 10, 1901.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORN ET AL. } Equity. No. 15141.

To avoid unnecessary expense in the appeal in this case it is stipulated and agreed between the parties to the cause as follows:

1st. That it is a fact which the evidence in this case discloses that in the division between Abraham Young, as original proprietor, and the United States, on the division of the land laid out for the city of Washington, the ground mentioned in this suit was alloted to said Abraham Young; that on the proceedings had for partition of the esstate of said Abraham Young, in 1801, the said ground was allotted to his son, John Young, in severalty; that said John Young died intestate and unmarried, leaving brothers and sisters as his heirs-at-law (all of whom are now deceased); that by conveyances, wills, and descent such title as said brothers and sisters died seized of has become and is now vested in the parties to this cause (other than John E. Roller)—that is to say, that the entire title of said John Young is represented by the parties to this cause other than defendant John E. Roller.

Provided, however, that this stipulation shall in no way be construed as an admission of the right of said John E. Roller to prosecute an appeal in this case, and all questions in relation to such right to appeal being reserved.

JOHN E. ROLLER, *Appellant*,
By D. S. MACKALL, *His Att'y.*

HENRY E. DAVIS,
Sol'r for Compl'ts.
LEO SIMMONS.

The clerk will please include this stipulation in the record in this appeal in this case.

LEO SIMMONS AND
D. S. MACKALL,
For Plaintiffs.

39 EXHIBIT "H."

Liber J. A. S., folio 224.

Corporation of Washington to Richard Barry. } Deed. Recorded 23d March, 1852.

This indenture, made this sixth day of March in the year of our Lord one thousand eight hundred and fifty-two. Between the Mayor, Board of Alderman and the Board of Common Council, of the city of Washington, of the first part, and Richard Barry of said city of the second part. *Whereas* the said corporation by virtue of the powers in them vested by their charter, have from time to time, laid and imposed certain annual taxes, on all the real and personal assessable property within the said city, agreeable to the several assessments thereof, and have by sundry acts, providing for the collection of such taxes enacted "That whenever two or more years' taxes, or real property, whether improved or unimproved, in the city of Washington, shall remain due and unpaid or whenever any special tax, on any real property, shall remain unpaid for two or more years, after the same shall have become due, it shall be the duty of the collector, in whose hands such taxes may be placed for collection, to sell such real property or so much thereof, not less than a lot, (when the property on which the tax has accrued is not less than that quantity) as may be necessary to pay any such taxes with all legal costs, and charges thereon, at public sale, to satisfy the said corporation therefor," subject however, to the terms, conditions, provisoes and restrictions, as are in the said acts mentioned, first giving such notice of the time and place for the sale, as said acts require: and whereas lots numbered eight, nine and ten, in square ten hundred and twenty-eight lying and being within the said city, became chargeable as the property, and in the name of James W. Scott, with the following taxes: that is to say for the years 1824, 1825–1826–1827–1828–1829–1830–1831–1832–1833–1834–1835–1836–1837-1838-1839–1840–1841–1842–1843–1844–1845 and 1846 the sum of twelve dollars and eighty-three cents. And whereas, the property above described having become liable to be sold under the act in part above quoted, Andrew Rothwell the collector in whose hands the said taxes were placed for collection, failing to collect them in any other way, after having previously given public notice for the sale by advertisement thereof twelve successive weeks, next before the day of sale, in the National Intelligencer, a newspaper printed in the city of Washington, therein describing as above the said property, to whom assessed at the time of such advertisement, the said amount of taxes due, and the year for which the same were due, did offer for sale, at public auction, on the eighth day of December, A. D. eighteen

hundred and forty-seven, all of said lots to pay the said taxes and the expenses attending the sale, when the said Richard Barry, being the highest bidder became the purchaser thereof, for the sum of sixteen dollars and fifty-three cents, and then paid to the said collector the taxes aforesaid and the expense attending said sale, amounting to the sum of sixteen dollars and fifty-three cents, and more than two years having elapsed since the day of said sale, and the said property not having been redeemed, as by law provided, the said party of the second part, has become entitled to a conveyance thereof;

Now, therefore, this indenture witnesseth: That the said Mayor, Board of Alderman and Board of Common Council, parties of the first part in consideration of the premises, and of the sum of one dollar, current money to them in hand, paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt of which, is hereby acknowledged, have granted, bargained and sold, and by these presents, do grant bargain and sell
40 unto the said party of the second part, his heirs and assigns forever, all the said hereinbefore-described lots, number eight, nine and ten, in square number ten hundred and twenty-eight, with the appurtenances. To have and to hold the said premises with the appurtenances unto the said party of the second part, his heirs and assigns forever, to his and their use.

In testimony whereof, the mayor of the said city hath hereunto set his hand and caused the seal of the said corporation to be affixed, on the day and year first above written.

WALTER LENOX, *Mayor.* [SEAL.]

Attest: WM. J. McCORMICK.

DISTRICT OF COLUMBIA, } *sct:*
Washington County, }

Be it remembered, that on this sixth day of March, in the year of our Lord one thousand eight hundred and fifty-two, before the subscribers, two justices of the peace, in and for the county of Washington, personally appears Walter Lenox, Esq., mayor of the city of Washington, and acknowledged the foregoing indenture or instrument of writing to be the act and deed of the mayor, board alderman, and board of common council of the city of Washington, delivered for the use and purposes therein expressed.

H. NAYLOR, *J. P.* [SEAL.]
WM. J. McCORMICK, *J. P.* [SEAL.]

Endorsed.

Fee, $1.75.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber J. A. S. No. 35, fol. 224 *et seq.*, one of the land records of the District of Columbia.

Office of the Recorder of Deeds, Washington, D. C., July 24, 1895.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

"EXHIBIT I."

Liber No. 788, folio 240 *et seq.*

Eliza Barry *et al.* to Wm. H. Triplett. } Deed. Recorded June 17, 1875—2.45.

This indenture made this tenth day of June in the year of our Lord one thousand eight hundred and seventy-five by and between Eliza Barry widow of Richard Barry, deceased, Mary Barry, Helen F. Barry, Sallie L. Barry and Anna M. Barry only heirs of said deceased of the city of Washington in the District of Columbia of the first part and William H. Triplett of the said city of Washington of the second part, *witnesseth* that the said parties of the first
41 part for and in consideration of the sum of fourteen hundred and fifty-two dollars and six cents in lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened enfeoffed, released and conveyed and do by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part his heirs and assigns forever. All these certain pieces of parcels of ground situate and lying in the said city of Washington and being known and described as lots numbered eight (8) nine (9) and ten (10) in square numbered one thousand and twenty-eight (1028) together with all the improvements, ways, easements, rights, privileges and appurt-ances to the same belonging or in anywise appertaining and all the remainders, reversions, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand, either at law or in equity, or otherwise however of the said parties of the first part of in to or out of the said described real estate and premises. To have and to hold the said described real estate and premises and appurtenances unto the said party of the second part his heirs and assigns to his and their sole use benefit and behoof forever. And the said parties of the first part for themselves and their heirs, executors and administrators do hereby covenant, promise and agree to and with the said party of the second part his heirs and assigns, that they the said parties of the first part and their heirs shall and will warrant and forever defend the said described real estate and premises and appurtenances unto the said party of the second part his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof by from under or through themselves their heirs or any of them. And further that they the said parties of the first part and their heirs shall and will at any and at all times hereafter upon the request and at the cost of the said party of the second part *her* heirs

or assigns make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said described real estate and premises and appurtenances unto the said party of the second part his heirs or assigns as the said parties of the second part his heirs or assigns or his or their counsel learned in the law shall advise, devise or require.

In testimony whereof the said parties of the first part hereunto set their hands and seals on the day and year first hereinbefore written.

ELIZA BARRY. [SEAL.]
MARY BARRY. [SEAL.]
HELEN F. BARRY. [SEAL.]
SALLIE L. BARRY. [SEAL.]
ANNA M. BARRY. [SEAL.]

Signed, sealed and delivered in the presence of—
ROBERT H. WARD.
M. H. N. KENDIG.

42 DISTRICT OF COLUMBIA, } ss:
County of Washington, }

I, M. H. N. Kendig, a notary public in and for the said county, in said District, do hereby certify that Eliza Barry, widow of Richard Barry, deceased; Mary Barry, Helen F. Barry, Sallie L. Barry, and Anna M. Barry, only heirs of said deceased parties to a certain deed bearing date on the tenth day of June, A. D. 1875, and hereto annexed, personally appeared before me, in the said county, the said Eliza Barry, Mary Barry, Helen F. Barry, Sallie L. Barry, and Anna M. Barry being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed.

Given under my hand and my notarial seal this tenth day of June, A. D. 1875.

M. H. N. KENDIG, [NOTARIAL
Notary Public. SEAL.]

The tax bill amounting to $205.73 is assumed by the purchaser in the foregoing deed.

ROBERT H. WARD.

Endorsed.

Fee, $1.75.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 788, fol. 240 *et seq.*, one of the land records of the District of Columbia.

Office of the Recorder of Deeds, Washington, D. C., July 24, 1895.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

"EXHIBIT J."

Liber 1147, folio 289.

W. H. Triplett to Joseph S. Irwin. } Deed. Recorded Oct. 23, 1885, 12.30 p. m.

This indenture made this first day of September in the year of our Lord one thousand eight hundred and eighty-five between W. H. Triplett of the city of New York of the first part and Joseph S. Irwin of the county of Shenandoah and State of Virginia of the second part.

Witnesseth that the said party of the first part for and in consideration of the sum of three thousand $3000.00 dollars current money of the United States to him in hand paid by the said party of the second part the receipt of which before the ensealing and delivery of these presents, is hereby acknowledged has granted, bargained and sold, aliened, conveyed and confirmed, and by
43 these presents does grant, bargain and sell, alien, enfeoff, convey and confirm unto and to the use of the said party of the second part his heirs and assigns all of certain piece or parcel of land and premises situate and being in the city of Washington, District of Columbia and known and distinguished as lots numbered eight (8), nine (9) and ten (10) in square numbered one thousand and twenty-eight (1028) being the same conveyed to the party of the first part by Eliza Barry, Mary Barry, Helen H. Barry, Sallie L. Barry and Annie M. Barry as by deed bearing date the tenth day of June eighteen hundred and seventy-five and duly recorded in Liber No. 788, folio 240 one of the land records for — county, in the District of Columbia together with the rights easements, privileges, and appurtenances to the same belonging or in anywise thereto appertaining. To have and to hold the said land and premises with the appurtenances and hereditaments to the same belonging, unto and to the only use and benefit of said party of the second part his heirs and assigns. And the said party of the first part for himself and his heirs, executors and administrators does hereby covenant with said party of the second part his heirs and assigns that the said hereinabove-described land and premises, with the appurtenances unto said party of the second part his heirs and assigns, from and against all persons claiming by, through or under said party of the first part or his heirs and assigns the said party of the first part and his heirs shall and will forever warrant and defend by these presents, and further that any act or deed deemed by counsel learned in the law requisite and necessary the more perfectly to assure unto said party of the second part his heirs and assigns the said land and premises, hereinabove granted the said

party of the first part and his heirs shall and will at all times and at the cost of the person requesting the same, do, perform, execute and deliver.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

W. H. TRIPLETT. [SEAL.]

Signed, sealed and delivered in presence of—

———.

CITY AND COUNTY OF NEW YORK, *To wit:*

I, Stephen F. Hart, a notary public in and for the county and city aforesaid, do hereby certify that W. H. Triplett, party to a certain deed bearing date on the first day of September, A. D. 1885, and hereto annexed, personally appeared before me, in the said city aforesaid, the said W. H. Triplett being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this first day of September, A. D. 1885.

STEPHEN F. HART,

[NOTARIAL SEAL.] (*No.* 93), *Notary Public, N. Y. County.*

44 STATE OF NEW YORK, *City and County of New York,* } *ss:*

I, Patrick Keenan, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify that S. F. Hart, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such proof and acknowledgment a notary public in and for the city and county of New York, dwelling in said city, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 21st day of October, 1885.

[COURT SEAL.] PATRICK KEENAN, *Clerk.*

Endorsed.

Fee, $2.00.

This is to certify that the within is a true and certified copy of an instrument as recorded in Liber 1147, fol. 289 *et seq.*, one of the land records of the District of Columbia.

Office of the Recorder of Deeds, Washington, D. C., July 24, 1895.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

"EXHIBIT K."

Liber 1374, folio 395.

Joseph S. Irwin
to
Jno. Ambler Smith. } Deed. Recorded April 8, 1889, 1.25 p. m.

This indenture made this 10th day of September 1887 between Joseph S. Irwin of the county of Shenandoah and State of Virginia of the one part and John Ambler Smith of the city of Washington and District of Columbia of the other part. *Witnesseth* that the said party of the first part for and in consideration of one dollar in hand, paid, by the said party of the second part the receipt of which before the ensealing and delivery of these presents, is hereby acknowledged and in pursuance of a decree of the circuit court of Shenandoah county in the State of Virginia, of this day has granted, bargained and sold, aliened, conveyed and confirmed, and by these presents does grant, bargain and sell, alien, enfeoff, convey and confirm unto and to the use of the said party of the second
45 part, his heirs and assigns, all of those certain pieces or parcels of land and premises situate and being in the city of Washington, District of Columbia, and known and distinguished as lots numbered eight (8), nine (9), and ten (10) in square numbered one thousand and twenty-eight (1028) being the same conveyed to the party of the first part, by William R. Triplett by deed bearing date the 1st day of September 1885, and duly recorded in Liber No. 1147 folio 289 *et seq.* one of the land records of the said District of Columbia, together with the rights, easements, privileges and appurtenances to the same belonging or in anywise thereto appertaining. To have and to hold the said land and premises with the appurtenances and hereditaments to the same belonging unto and to the only use and benefit of said party of the second part, his heirs and assigns. And the said party of the first part, for himself and his heirs, executors, and administrators does hereby covenants with said party of the second part, his heirs and assigns, that the said hereinabove described land and appurtenances unto said party of the second part, his heirs and assigns from and against all persons claiming by, through or under said party of the first part or his heirs and assigns, he the said party of the first part, and his heirs, shall and will forever warrant and defend by these presents and further that any act or deed, deemed by counsel learned in the law, requisite and necessary, the more perfectly to assure unto said party of the second part, his heirs and assigns, the said land and premises hereinabove granted the said party of the first part, and his heirs shall and will at all times and at the cost of the person requesting the same, do perform, execute and deliver.

In testimony whereof the said party of the first part, has hereunto set *her* — and seals the day and year first above written.

I. S. IRWIN. [SEAL.]

STATE OF VIRGINIA, *Shenandoah County,* } *To wit:*

I, James H. Williams, a notary public in and for the county and State aforesaid, do hereby certify that Joseph S. Irwin, whose name is signed to the above writing, bearing date on the 10th day of September, 1887, personally appeared before me in my office and acknowledged the said writing to be his act and deed.

Given under my hand this 10th day of September, 1887.

JAMES H. WILLIAMS,
Notary Public.

[SEAL.]

STATE OF VIRGINIA, *Shenandoah County,* } *To wit:*

I, L. S. Walker, clerk of the county court of Shenandoah county, State of Virginia, the same being a court of record, do hereby certify that James H. Williams, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was at the time of taking such acknowledgment a notary public in and for the county of Shenandoah and State
46 of Virginia, dwelling in said county, commissioned and sworn and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary and verily believe that the signature to the said certificate of acknowledgment is genuine. I further certify that said instrument is executed and acknowledged according to the law of the State of Virginia.

In testimony whereof I have hereunto set my hand and affixed the seal of the court aforesaid, at Woodstock, Va., this the 10th day of September, A. D. 1887.

L. S. WALKER, *Clerk.* [SEAL.]

Endorsed.

Fee, $1.75.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1874, folio 395 *et seq.*, one of the land records of the District of Columbia.

Office of the Recorder of Deeds, Washington, D. C., July 24, 1895.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

EXHIBIT "L."

Liber 1374, folio 397.

John Ambler Smith *et ux.* to John E. Roller. } Deed. Recorded April 8, 1889, 1.30 p. m.

This indenture made this eighth day of November in the year of our Lord, one thousand eight hundred and eighty-seven by and between John A. Smith and Nannie L. Smith of Washington, D. C., of the first part, and John E. Roller of Harrisonburg, Virginia, party of the second part. *Witnesseth* that the said parties of the first part, for and in consideration of the sum of one dollar in hand paid and the assumption of all liens, taxes and other incumbrances, in lawful money of the United States to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof, is hereby acknowledged, *do*—granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents, grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part, his heirs and assigns, forever, the following-described real estate, situate in the city of Washington, D. C. to wit: All those certain piece- or parcel- of land and premises known and distinguished as being lots eight (8), nine (9), & ten (10) of square ten hundred and twenty-eight (1028) as laid down in the official map of the city of Washington, D. C. Together with all the improvements, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging or in anywise ap-
47 pertaining, and all the remainders, reversions, rents, issues and profits thereof; and all estate, right, title, interest, claim and demand, whatsoever, either at law or in equity, of the said party of the first part, of, in, to or out of the said pieces or parcels of land and premises. To have and to hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his sole use, benefit and behoof forever.

In testimony whereof, the said parties of the first part, have hereunto set their hands and seals on the day and year first hereinbefore written.

JOHN A. SMITH. [SEAL.]
NANNIE L. SMITH. [SEAL.]

Signed, sealed and delivered in the presence of—

W. P. BELL.

DISTRICT OF COLUMBIA, *ss:*

I, W. Pierce Bell, a notary public in and for the District aforesaid, do hereby certify that John A. Smith and Nannie L. Smith, his wife, parties to a certain deed bearing date on the eighth day of November, A. D. 1887, and hereunto annexed, personally appeared before me in the District aforesaid, the said John A. Smith and Nannie L. Smith being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Nannie L. Smith, being of full age and being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this eighth day of November, A. D. 1887.

[NOTARIAL SEAL.]

W. P. BELL,
Notary Public.

Endorsed.

Fee, $1.75.

This is to certify that the within is a true and verified copy of an instrument as recorded in Liber No. 1374, folio 397 *et seq.*, one of the land records of the District of Columbia.

Office of the Recorder of Deeds, Washington, D. C., July 24, 1895.

GEO. F. SCHAYER,
Dep. Recorder of Deeds.

48 *Deposition on Behalf of Complainants.*

Filed January 7, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORN ET AL. } Equity. No. 15141.

Thereupon JOHN E. ROLLER, one of the defendants, produced as a witness on the part of the complainants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Mr. SIMMONS:

Q. General, did you know James Ward Scott, deceased? A. I did not.

Q. Did you know any of his sons? A. I know the eldest one, William Lee Scott, of Illinois.

Q. Did you know from reputation in the family how many children James Ward Scott had? A. I know from correspondence with every member of the senior James Ward Scott, and from conversations with William Lee Scott that there were three sons. William Lee Scott, Jr., Doctor James Ward Scott, and Leander Scott.

Q. Do you know if they were all married? A. They were all married.

Q. Do you know the names of their children? A. I only know it from correspondence and reputation in the family, you might say. I think it is fair to state that it might amount to a reputation.

48½ Q. Just state their names then? A. The wife of William Lee Scott is Anna P., and he ha children William Lee Scott, Jr., Leanna (?) Scott; Mary P. Scott, Louisa Scott and Martha Scott, all infants. The name of the wife of Doctor James Ward Scott, Jr., is Lena Rosan, and they have children as follows: Corinne Lee Scott, who is an adult, and James Ward Scott the third, and Julian Fairfax Scott; the last two are infants. The wife of Leander Scott is Flora Gardner, and they have children, Clara Isabell Scott, an infant.

Q. Do you know this from knowing the parties and representing them as attorney in different cases? A. I have represented them for over four years in various matters of business here, and have arrived at this knowledge from the correspondence that I spoke of, and my interviews with the one brother.

NOTE.—It is agreed by and between the counsel for the respective parties that the deed recited in the bill in this cause, or certified copies thereof, or so many of them as shall be required by the defendant, Roller, shall be filed as exhibits in evidence in this case.

JOHN E. ROLLER.

Signed by the examiner pursuant to agreement of counsel first had and obtained.

J. ARTHUR LYNHAM,
Examiner-in-chancery.

49 *Depositions for Defendants.*

Filed January 7, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL. vs. SALLIE OSBORN ET AL. } In Equity. No. 15141.

Be it remembered that at an examination of witnesses begun and held pursuant to agreement on the 5th day of March, 1895, at which said examination there were present Leo Simmons, Esq., solicitor

for complainants and certain defendants; Douglass S. Mackall, Esq., solicitor for defendant John E. Roller, and John E. Roller *in pro. per.*, and Herbert M. Locke, Esq., guardian *ad litem* of the infant defendants, Alverda and Grace Osborn, personally appeared before me, J. Arthur Lynham, an examiner in chancery of said court, the within-named witnesses, who, being called for and on behalf of the defendants and being first duly sworn according to law to tell the truth, the whole truth, and nothing but the truth touching the matters at issue in the above-entitled cause, did depose and say what is hereinafter set out as stated by them.

WASHINGTON, D. C.,
March 5th, 1895—Tuesday, at 3 o'clock p. m.

Met, pursuant to agreement, to take testimony on the part of the defendants in the above-entitled cause.

Present: Leo Simmons, Esq., solicitor for complainants and certain defendants; Douglass S. Mackall, Esq., solicitor for defendants John E. Roller; Herbert M. Locke, Esq., guardian *ad litem* of the infant defendants, Alverda and Grace Osborn, and John E. Roller, Esq., one of the defendants.

Whereupon WILLIAM B. MARCHE, a witness of competent age, produced on the part of the defendants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By General ROLLER:

Q. State your age, residence, and occupation. A. My age is 53 years; born in Washington, District of Columbia; occupation, tinner.

Q. In what part of the city do you live? A. I live in the eastern part, 317 East Capitol street.

Q. In what part of the city have you lived during your life? A. In the eastern part of the city; in that immediate neighborhood.

Q. Do you know lots 8, 9, and 10, square No. 1028, on the corner of Maryland avenue and 13th street and F street? A. I don't know the lots by the numbers, but I know the corner very well; very well acquainted with the locality.

49½ Q. How long have you known that locality? A. Pretty much all my life; ever since I was able to know anything, almost.

Q. Have you or not had any experience in handling property while in that part of the city? And, if so, state how many pieces of property have been som handled by you. A. Well, I have handled 22 lots in East Washington, bought and built and sold in the last ten or twelve or fifteen years.

Q. In buying and building and selling property in East Washing-

ton have you or not acquired any knowledge of the values in that part of the city? A. Oh, yes, sir.

Q. Were or were not lots situated in the locality in which lots 8, 9, and 10, in square 1028, were a benefit or a burden previous to the close of the war? A. Well, it was rather burdensome property—that is, it was not hardly worth paying the taxes on in that locality; there were no streets laid out, and it was agricultural land really.

Q. Had Maryland avenue been graded prior to the close of the war? A. No, sir; there was only a country road through there, coming right in from Benning's and from the 7th Street road.

Q. Could any use be made of property in that vicinity to amount to anything? A. Not very well, sir; it was all ravines and hills and slashes at that time.

Q. Lots that were laying low and were exposed to the drainage of other lands occupying higher situation, could or could they not be used for agricultural purposes or gardening? A. Well, of course, the higher and dryer lands were used for that purpose.

Q. My question referred to lots that received the drainage from the higher lots—through which the drainage ran? A. They could hardly be used for that purpose, I think; I am not much of a farmer, myself.

Q. Has the lots increased in values in that part of the city since the last ten or fifteen years? A. Yes, sir; there has been an immense increase.

Q. When did that increase begin? A. It started in about the seventies, the time the Board of Public Works *was* opened up the streets through there and brought the land into market, or since the war.

Q. Was the increase rapid at first, or did it become more rapid as time continued? A. Within the last ten years it has increased very much and very rapidly.

Q. What would be a fair estimate of the value of lots situated as those were, say about the year 1850 or 1852, per foot? A. Well, they could hardly be estimated by the foot; I should hardly think—they might bring a few mills, probably.

Q. What would be the value of such lots as those, say, five years ago? A. Well, five years ago I suppose they were up to about seventy-five cents, and since that time have gone up as high—a dollar and twenty-five cents. I was looking at some lots in that immediate neighborhood about two years ago, and they asked me $1.26 for it—between 12th and 13th, on Maryland avenue—inside lots.

50 Q. Back as far as fifteen years ago what would they be worth? A. Well, about ten cents.

Q. Has or has not the population of that part of the city increased in the last ten years? A. Oh, yes, sir.

Q. How many fold has it increased? A. Oh, my, I could hardly estimate it. I don't know. It has more than threebled.

Q. Has or has there not been any building in the last ten or fifteen years in that part of the city? A. Yes, sir; there has been hundreds of houses built right around in that immediate neighborhood—hundreds of them—within the last three or four years.

Q. Could you say that the development of that part of the city has been especially rapid in the last ten years? A. Yes, sir; more rapid than any other part, I think.

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Marshe, you say that the property could not be used before the war? A. Yes, sir.

Q. Might it not have been used for farming purposes? A. Well, a portion of it—the high lands and the upper part. It was hills and ravines and slashes. The tidewater made up pretty near to them from the Eastern branch.

Q. You don't mean it ever went up to there? A. Well, not very far off.

Q. Well, how far off? A. Fifteenth street.

Q. Well, that's a quarter of a mile from Thirteenth street, isn't it? A. Well, sir, Fifteenth street ain't a quarter of a mile from Thirteenth street.

Q. How wide was that lot? A. Six or seven hundred feet; it might have been a thousand feet.

Q. Did you ever do any farming, Mr. Marche? A. No, sir; I have never farmed.

Q. Well, Mr. Marche, you say that the land was not worth anything in 1852? A. Well, I say it was hardly worth enough to pay the taxes on in that locality.

Q. Did you buy lots in 1852? A. No, sir.

Q. Did you own any in 1852? A. No, sir; I was not but ten years old in 1852.

Q. Then, you didn't know much about the values of land at that time in that locality? A. Oh, of course, the values of land I didn't know at that time, but I knew in later years the values had not increased any when I became old enough to know anything about the values of land.

Q. Then, you were ten years old in 1852? A. Yes, sir; I was born in April, 1842, and next April I will be 53 years of age.

Q. Where is this property located? A. Thirteenth and Maryland avenue, sir, according to the description given to me. I haven't seen that particular property. You asked me if I knew any in that locality—Thirteenth and Maryland avenue.

51 Q. You are testifying from what you heard? A. From what the General told me about the property—where it was located. I am testifying about the location.

Redirect examination.

By General ROLLER:

Q. He only gave you the location of the lots as being on the corner bounded by Maryland avenue and Thirteenth street and F street? A. Yes, sir.

Q. You had information enough of your own to know what the location was? A. Yes, sir.

Mr. SIMMONS: I object to the question as being leading.

Q. How do you happen to remember the condition of things in those days? Can you describe any of your adventures in connection with it? A. You know where the ice-house is, the Isherwood place there at Fifteenth and A streets, I suppose it is, to D street, I think it is, that large brick house on the hill just above Isherwood? My father plastered that house, and I took his meals out to him, and then, when I was a boy, I went down there to the Cool run, just below there, bathing. Boys used to go there swimming, just below that, to the Cool run, just below Isherwood, and those used to be our tramping grounds. We used to go up there gunning and chasing rabbits and blackberrying, and all such things as that; right out Seventh Street road. It came right in there in that locality; the Seventh Street turnpike came in there, and that was a great place for boys to go out there and congregate, &c.

Q. Do you remember an occasion when you went to your sister's wedding? And, if so, state what you saw then.

Mr. SIMMONS: I object to that question as being leading.

A. Well, I was born on Fourth street southeast between D and E streets, and my sister was married about thirty-five years ago, and she lived at the corner of East Capitol and Sixth street northeast, next to the corner, just across East Capitol street, and between my father's house and her husband's there was nothing but open fields and gardens. Across there I have gone and picked blackberries and stoned rabbits all along there. That land was worth then about two or three cents a foot; between those localities.

Recross-examination.

By Mr. SIMMONS:

Q. Mr. Marche, how often did you go to the Cool run you have mentioned? A. Every Saturday almost all my life.

Q. Do you know where the Cool run is located now? A. I can't exactly tell you between what streets, but it is about—well, the Cool run is right back of Isherwood's house, just down by the
52 low land there; the low place between Benning's bridge and the jail—between Benning's bridge and the jail.

Q. How did you get there? Did you wade out in the Eastern branch to get to the Cool run? A. No, sir; that was part of the high land right down from Isherwood's, right off of the hill; then the swamp made up around the foot of that hill, and the Cool run is there yet.

Q. Is it not a fact that the Eastern branch never reached as high as the Cool run—came as far west as the Cool run? A. No, sir; it is not. The Eastern branch proper never came up there, but the swamp did. It is there yet, a part of it; it has been filled in until it is filled up thousands of feet from where it used to come.

Q. Have you ever seen any of this land in 1852 being used as cornfields? A. No, sir; but on the high lands, as I told you, there was plenty of it.

Q. What was this land down at Maryland avenue and Thirteenth street—was not that part of the high lands? A. No, sir; there was a ravine that ran through there.

Q. What part of it? A. Right through that locality.

Q. What was the size of the ravine? A. I could not exactly tell you the size of it; but it ran down from Isherwood's house; it ran down right through and up the other way.

Q. Which way did it run from Isherwood's house? A. It ran northwest.

Q. Northwest from Isherwood's house? A. Yes, sir.

Q. Can you locate Isherwood's house? A. It is on Fifteenth street, about D and Fifteenth streets.

Q. Is it not below Fifteenth street? A. It is not exactly on the line of the street; it sets back.

Q. It is not on E street is it? A. It might be; I would not be positive about it, but it is D or E.

Q. When was that ravine filled up, Mr. Marche? A. It was filled up by the Board of Public Works, most of it.

Q. That was in 1872, was it? A. Along about that time, yes, sir; in the seventies.

Q. How often did you go out in that neighborhood, Mr. Marche? A. When I was a boy I was out there every Saturday, when I was not at school; of course, when I had holiday I went out there in that neighborhood.

NOTE.—It was agreed by and between the respective solicitors and the witness that the examiner should sign his deposition when it was written out.

WILLIAM B. MARCHE,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

NOTE.—The foregoing witness was, at the close of his said deposition, paid the usual witness' fee, $1.25, by the defendant General John E. Roller.

At this point adjournment was taken until tomorrow, Wednesday, March 6th, 1895, at 10 o'clock a. m.

58 WEDNESDAY, *March 6th*, 1895—10 o'clock a. m.

Met pursuant to adjournment.

Present: Leo Simmons, Esq., solicitor for complainants and certain defendants; D. S. Mackall, Esq., solicitor for defendant John Roller; Herbert M. Locke, Esq., guardian *ad litem* of the infant defendants, Alverda and Grace Osborn, and General John E. Roller, one of the defendants.

Whereupon JOHN E. HERRELL, a witness produced on the part of the defendants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By General ROLLER:

Q. State your age, residence, and occupation. A. I reside at 926 Pennsylvania avenue southeast; I am occupied at this time in the banking business.

Q. You might state that you are president of the National Capital savings bank? A. Yes, sir; president of the National Capital bank.

Q. State whether or not you have had any familiarity with property in the northeast section of the city; and, if so, how far back your knowledge and experience in that direction extends.

Mr. SIMMONS: I object to that question as being immaterial, irrelevant, and not competent to the issue in question.

A. Well, I have been living in East Washington since 1861, living in Washington city since 1850, and during all my residence in Washington city I have been familiar with the property in most every section. In the first place, I was a bricklayer. I worked in every section of the city at my trade. Later and after I became a brickmaker I furnished brick in every section of the city and became familiar in that way, and since 1861, I have been living in the eastern part of the city, and I am generally familiar with the property in that section of the city as well as in all others.

Q. Have you or not owned real estate in that part of the city? A. Yes. I am familiar with the whole of the city from 1850, and the eastern section of the city more especially since 1861.

Q. Have you or not had any knowledge and experience with the values of property in that part of the city during the period named? A. Yes. The first piece of property I bought in that part of the city I bought in 1862—in the eastern section.

Q. Have you or not dealt in real estate in that part of the city to any extent; and, if so, to what extent? I mean just approximately, in general terms, whether largely or small. A. Well, yes; I have dealt in property in the eastern section of the city to a considerable extent.

54 Q. Can you say or not that you are familiar with values in that part of the city since 1850, say? A. Yes, but more especially since 1861.

Q. Do you know the location of lots 8, 9, and 10, in square 1028, corner of Thirteenth street and Maryland avenue and F street? A. Yes; I have a general knowledge of that locality.

Q. What was the condition of those lots and of that part of the city prior to the development of the same by the Board of Public Works in 1872? A. Well, it was laying out in the commons. It was a difficult matter to tell, with the exception of Maryland avenue, that there were any streets out there at that time. Maryland avenue was a fine street, because it was an outlet or an inlet from that part of the city to Bladensburg, and, while there was no improvement on it, the street was defined by the roadway.

Q. Have or have not values increased in that part of the city, beginning in 1870 and extending down to within the last few years? And, if so, describe the sort of increase.

Mr. SIMMONS: I object to that question as being immaterial.

A. Yes; values have increased in that locality very much since 1870. There was an increase from 1870 to about 1874, then the hard times came here, and I think there was a decrease after that until about 1878. Afterwards it commenced to go up and went up right along until 1892, when we had this last setback, and I think since that it has shrunk again.

Q. But would the values in 1892 compare with the values in the beginning of 1870, say? A. Well, they are ten times as much in 1892 as they were in 1870.

Q. What would be your estimate of the values of those lots per square foot in 1892? A. Sixty-five to seventy cents a foot; they are not worth that much now; I would not put them today at more than fifty cents a foot.

Q. What would be a fair estimate of the value of those lots prior to the war, say in 1860, per square foot? A. The probability is that that land was not worth more than a cent a foot—well, perhaps two cents a foot.

Q. What would be a fair estimate of the value of those lots per square foot, say in 1847 to 1852? A. Now, when you are getting back to 1847 you are getting behind my time in Washington city.

Q. Say 1850, then, to 1852? A. Well, the probability is they were not worth more than a half a cent a foot in 1850; I know that land that sells now for $2 a foot sold for a mill a foot in that part of the city; that is in the northwestern part of the city.

Q. Is or is not the northwestern part of the city a better section than the northeast? A. Decidedly; the land values have been higher there ever since I have been in the city, and are still higher.

Q. Referring to lots 8, 9, and 10, in square 1028, were there any houses near that locality, say in 1862? A. Very few; there was a scattering house here and there.

55 Q. Were there any houses there in 1870, when the increase in values began? A. Well, there was a few more; not many.

Q. What has been the condition of that part of the city with reference to houses, beginning in 1870 and coming down to the present time? A. Well, it has built up since 1880; it has built up very rapidly; today it is fairly well built up.

Q. Are there or not many houses in that locality? A. Oh, there has been thousands of them.

Q. In reference to the condition of the streets, have they or not been improved? A. Oh, vastly.

Q. Have they or not been graded? A. Been graded, and some of them have been—the carriageways have been paved; Maryland avenue, for instance, in 1870 there was neither footway or carriageway; now the footway is improved, the carriageway is paved with asphalt blocks, the water is down, the gas is down, and the sewerage is in that locality now.

Q. Do you know how it is with F street at the present day, and Thirteenth street? A. My impression is that F street, the grade is set, and the sidewalks are laid, and it is a dirt road, that's my impression.

Q. Has it water mains and gas mains in that locality? A. I think so; they have water and gas and sewerage, too.

Q. Prior to the war were or were not lots such as these in that locality a burden to the owner?

Mr. SIMMONS: I object to the question as being immaterial; it calls for the opinion of the witness, and it has no bearing on the case.

A. They were of very little value and they were costing the owners some taxes, although they were at that time very small. I don't know, though—the taxes were hardly considered a burden for a man to carry; the taxes were small.

Q. Has or has not the opportunity for making the property remunerative and yielding a return grown in the last eight or ten years?

Mr. SIMMONS: I object to that question for the same reason as given before.

A. Oh, vastly so.

Mr. SIMMONS: I have no questions to ask.

NOTE.—By agreement of counsel and the witness the examiner was instructed and authorized to sign the witness' name to his foregoing deposition.

JNO. E. HERRELL,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

56 Thereupon MARTIN L. WHEPLEY, a witness produced on the part of the defendants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By General ROLLER:

Q. State your age, residence, and occupation. A. Age, 38; residence, Washington, D. C.; real-estate broker.

Q. How long have you lived in the city of Washington? A. I came here in the fall of 1887.

Q. Did you hold any place—official place—in Washington prior to that date? A. No, sir; I was clerk in the office of the Secretary of the Senate some time during the year 1887.

Q. Do you know John E. Roller? A. Yes, sir.

Q. If so, how long have you known him? A. I have know him ever since I was a boy; twenty years, I suppose, or longer.

Q. Do you know whether or not since your residence in Washington Roller has claimed to be the owner of lots 8, 9, and 10, in square 1028, and has looked after them as such owner? And, if so, state what you know about it.

By Mr. SIMMONS: I object to that question as being immaterial, irrelevant, and incompetent.

A. Why, in 1888 or 1889 was the first I came to know that General Roller owned these lots. He was here and was visiting Washington, and I would meet him, and he was looking after fencing—looking after the fences on the property. He claimed the ownership of the property as far back, my recollection is, in 1888 or 1889.

Q. Did or did not you meet with him more than once in which he was engaged in the business of looking after the property?

Mr. SIMMONS: Objected — for the same reason as before.

A. Yes. To my knowledge I have met the General here at several different times. He was looking after property. I know of one time particularly when he called by my residence and I took a walk with him. Then he was going to see a party about repairing a fence. That was in 1889, I think; I know it was.

Cross-examination.

By Mr. SIMMONS:

Q. Are you a friend of Mr. Roller? A. Yes, sir; I am not an enemy, by any means. I am friendly to him; yes, sir.

Q. Did Mr. Roller tell you he claimed the lots or owned the lots? A. Yes; I think he did.

Q. In what words? A. Well, I can't remember exactly in what words; I don't remember the words, but it came about, I suppose,

in speaking of real estate in Washington. I never knew prior, of course, to 1888 or 1889 that he owned any property in Washington at all, and it just came up in this way: I think probably
57 the first time I came to know anything about it was when he spoke of getting a party to repair the fence, just in that way. He called by my house on one occasion where I was boarding, rather, and I took a walk with him, and he wanted me to go on down as far as where this property was lying, but I didn't go all the way; it was considerable walk; I bade him good-bye and came on back to the house.

Q. You didn't know anything about the location of the property? A. I don't think I did at that time.

Q. Did he state that it was his property in Washington, or that he was looking after the property in Washington generally, or this especial property? A. His special property, inclosing vacant ground.

Q. What time was that? A. What year?

Q. Yes. A. That was in 1889, I think, I am pretty sure.

NOTE.—By agreement of counsel and the witness the examiner was instructed and authorized to sign the witness' name to his foregoing deposition.

MARTIN G. WHEPLEY,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

Thereupon RETURN J. MEIGS, JR., a witness produced on the part of the defendants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Gen. ROLLER:

Q. State your age, residence, and what official position is now and has been held by you. A. I am sixty-five years of age; I will be in a few days. I am assistant clerk of the supreme court of the District of Columbia and have been since the 23rd of March, 1863.

Q. Is there any other person or official connected with this office who has been with it as long as you have? A. No.

Q. Where are the officers who were associated with you in office the 25th of March, 1863? A. Dead.

Q. Is or is not this office the successor of the custodian of the records of the old circuit court of the county of Washington? A. It is.

Q. At what period were the land records disconnected from this office and turned over to the recorder in his office? A. I don't remember the date.

—. It is fixed by the act of Congress, is it not? A. Yes, sir. I don't remember the date.

Mr. SIMMONS: I object to all that; the records will show.

Q. Were or were not the land records that had been in the custody of the circuit court of the county of Washington turned over to the recorder and his office at the date of the organization of the
58 recorder's office? A. Yes; they must have been; we had nothing to do with them then.

Q. Have you ever seen among the records of the circuit court of the county of Washington or of this court any record of the sales of lands—lands sold for delinquent taxes in the District of Columbia?

Mr. SIMMONS: I object to that; the records will show.

A. No, sir; I have not.

Q. What is the condition of the records of the old circuit court of the county of Washington? Are they in a regular condition so that any papers therein would be easily found, or are they in a confused condition? A. The records of the court are bound in volumes and may be examined, but not indexed. All the suits are indexed, but none of the proceedings of the court as sittings of the courts—they are not indexed. You would have to find everything by a long search, unless you know the date exactly of any special inquiry; you would have a long search.

Q. If there had been any record of the sale of delinquent land among the records to which you referred, could they be found without extraordinary labor? A. No, sir; it would require search; diligent search.

Q. During all the years, I suppose, covered by the records in order to say that there was or was not such a record, would it not? A. Well, I am not an expert in this matter. The title examiners are the ones to give the information.

Q. As I understand you, the records are not indexed and you must search through them, leaf by leaf, in order to find and be absolutely *true* that there is or is not such a record; is that correct? A. That applies to the sittings or the sessions of the court. As I said before, the books are all indexed.

Q. Are you able to say that all the records are complete and in existence—the records of the circuit court of the county of Washington? A. No; I am not; I have never heard it questioned that they were not.

Q. For example, can you say either that there was or was not book or books in which were recorded the sales of land delinquent for the non-payment of taxes in the District of Columbia, in that court? A. I never had occasion to make the inquiry to know anything about it. My business in the office had no application to them at all.

Q. Have you ever seen such a book? A. No.

Q. If there had been such a book in the office would you or not

have known it? A. I suppose I would. I arranged all the books that were left us by the circuit court, and spent four years in arranging papers every day, Sundays included.

Q. Is there any man in the office who could say positively or definitely whether such book was or was not in existence? A. I don't know; I never heard of such a book.

Q. Is there any man more familiar with it than yourself? A. Modesty would forbid me to say that. Some men know more
59 than I do, and every day tell me something. For instance, a naturalization was found in a book that I had no knowledge of before, and I denied in fact that there was such a book. That shows how things might have escaped me. There are a ton of books here, mostly the largest of which were fee books. I never looked into them. Of course, they were belonging to old clerks, and I had nothing to do with them. How these other books escaped me, I don't know.

Q. Has any one that you know of ever gone through this ton of books of which you speak, so as to know positively and truly what records are there? A. Nobody that I know of living. I handled them all, from time to time, cursorily to find out.

Q. Would it not be a very heavy task to go through these books one by one in order to see what record books were in existence? A. Yes, sir; and they would be exceedingly dirty.

Q. It would be laborious and expensive, would it not? A. Yes; it would be. If a man cared for his appearance. If he wanted to keep clean he would not attempt it.

Q. Could or could not the force in this office be detained for that purpose; would it be a reasonable request to ask it? A. I don't think it would; I know he could not have time to do it.

Q. Are you able to say that all the records of that court and of that office are even in existence, and among that ton of books to which you referred? A. (Question not answered.)

By Mr. MACKALL:

Q. The question now is whether or not you are able to state that the records of that old circuit court are still in existence. A. Nothing has ever been disturbed from here that I have heard of.

Q. The question is whether you know that they are all in existence or not at this day. A. No; I don't know that they are; some might have been disturbed last night; I could not tell that absolutely.

By Gen. ROLLER:

Q. Well, they might have been disturbed before, might they not? A. Yes, sir.

Q. Would or would not the possibility of such disturbance or nonexistence be increased as you go back into the years, say forty or fifty years ago? A. Of course it would; I think so.

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Meigs, what you have referred to has been relating to the court proceedings, has it not? A. Yes, sir; from my knowledge of the court proceedings.

Q. The records from 1852 down are pretty straight, are they not? A. The records of the court seem to be all correct whenever I have had occasion to examine them, but in inquiries that I have
60 made, as I say, of the sessions of the court have been found by turning over leaf after leaf.

Q. That is referring to the sessions of the court? A. Yes; the minutes of the court, for instance.

Q. The office of the recorder has been kept a separate office all along? A. Yes; since the organization of this court.

Q. What I mean is, there was a separate office kept for the record of deeds and transfers? A. Yes; but they had separate rooms; the rooms that are now used by the marshal's office, that and the present witness-room.

Q. That was kept separate from the clerk's office? A. Yes, sir.

Q. And all those books were transferred to the recorder's office? A. Yes, sir.

Q. You never heard of any being lost? A. No, sir.

Q. Never was questioned at all? A. Never was questioned at all before.

Redirect examination.

By Gen. ROLLER:

Q. Did or did not these offices open into each other? A. Yes, sir; they were a part of each other; in the office of the clerk was the recorder of deeds, but he had his deputy who attended to that matter.

Q. The rooms were communicating? A. Yes, sir.

Q. The records were as much under his control in the one room as in the other? A. Mr. Smith, the clerk, previous to this court's organization, had his office on the first room on your left as you entered the east entrance of the court-house, and back of that was the volumns of the records, in a long room opposite where the clerk's copyists were engaged. I gave them pens the first day I got here. They did not have any pens.

Q. Then the clerks engaged in recording the land records were in the same room with the clerks engaged in that work? A. They were in adjoining rooms with doors opening between.

Q. And the clerk of the court in charge was here (indicating)? A. Yes, sir; he had his office there.

Q. And the books easily accessible from either room? A. Oh, yes, sir.

Q. So they could easily have been in one room or the other? A. Yes, sir.

Q. Are you able to say positively and as a fact that all the books that were kept in the room in which the land records were kept were transferred from that room to the recorder's office when that office was created? A. No, indeed. I don't know anything about it.

Q. Where are the parties who did that work? Are they living? A. They have gone to Heaven. I know Mr. Nailor has.

61 Recross-examination.

By Mr. SIMMONS:

Q. Mr. Meigs, you don't mean to say that all the parties are dead that had anything to do with those records? A. I say the recorder of deeds—I mean him—Mr. Nailor. Mr. Smith is dead. Mr. McNamee is dead.

Q. You had nothing to do with the recorder's office? A. Nothing in the world, except to lend them pens.

Q. You have never heard of any books that were lost being in the recorder's office? A. Never.

Q. You have never heard of any books being lost while or after the transfer from the clerk's office to the recorder of deeds, have you? A. No, sir.

Q. There has never been any complaint or you have never heard of any that any such books have been lost, have you? A. Never heard of any.

Q. It is generally understood that the records are very complete and perfect in the record office?

Mr. MACKALL: We object to that as incompetent testimony.

A. I have never heard any question about the records of the recorder of deeds in any way, except once, and that was a question where a book was mutilated, and they did not know who did it.

By Mr. MACKALL:

Q. Mr. Meigs, you have stated in reply to questions of Mr. Simmons that you never heard any complaint about the loss of records in the recorder's office. You mean by that the present records themselves, don't you? A. I mean any records ever since I have been here; I have never heard any complaint about the loss of books.

Q. You are unable to state whether or not the books and proceedings of the office of the old circuit court are all in existence or not, are you? A. I think I have answered that.

Mr. SIMMONS: I object to that question as being immaterial to the issue.

Q. I asked you whether or not you are able to state that none of them are lost. A. No; I can't state that.

Q. Is not it a fact that some of the old papers of the circuit court have been lost? A. I can't tell you that.

Q. Isn't it a fact that a great many of the old papers and records of the circuit court are missing? A. Oh, yes; and equity papers, too. I know one respectable gentleman who sent a chest full of papers, and another who sent several wheel-barrow loads, showing that they had faith that the papers would now be faithfully kept.

By General ROLLER:

Q. Were or were not lawyers allowed in those days to take out the papers and books of the office if they desired to do so?
62 A. Yes; they were allowed to take out papers when they pleased; those men were of the highest respectability.

Q. Is it not true that in that way a great many of the papers got lost and misplaced? A. Certainly.

Q. Might they not also have taken out some of the books? A. Yes, indeed, they might.

By Mr. SIMMONS:

Q. Mr. Meigs, you have never heard of any books being lost? A. Never.

Q. And those books you refer to as having been lost relate solely to the court proceedings? A. Yes, sir.

Q. Cases pending in court? A. Yes, sir they were not all pending; they might have been settled, for all I know; a great many of them were; I have never had a call for papers that were lost, except for title mongers. I don't mean any disrespect to them.

Q. These papers you referred to as having been lost have nothing to do with the recorder's office? A. Not as far as I know.

By Gen. ROLLER: Do you know any official connected with the office prior to your day who is living? A. No, sir. I don't recall one. I believe none are living. I had that called to my attention a few weeks ago, and I didn't consider myself old then because I am the only one living.

NOTE.—By agreement of counsel and the witness the examiner was instructed and authorized to sign the witness' name to the foregoing deposition.

RETURN J. MEIGS,
By J. ARTHUR LYNHAM, *Examiner.*

Thereupon ANNA M. BARRY, a witness produced on the part of the defendants, being first duly sworn according to law, was examined, and testified as follows:

Direct examination.

By Gen. ROLLER:

Q. Where do you and where have you resided during your lifetime? A. Washington; I was born in Washington, and have resided here ever since.

Q. What relation were you, if any, to Richard Barry? A. Daughter.

Q. When did he die? A. Twenty-seven years ago; you will have to add it up.

Q. Mrs. Barry, I will show you the following tax bills. I will ask you where you got those tax bills.

Tax bill for the year 1853. Date of receipt, August 31st, 1853; signed, "R. J. Roach, collector."

Also receipted tax bill for the year 1854. Date of receipt, January 12th, 1855; signed by "R. J. Roach, collector."

63 Also receipted tax bill for the year 1855. Dated of receipt, January 5th, 1856, and received payment, "M. M. McCalla, collector."

Also receipted tax bill for the year 1856. Dated of receipt, September 15th, 1856; signed, "M. M. McCalla, collector."

Also receipted tax bill for the year 1857. Dated of receipt, January 16, 1858; signed, "James F. Halliday, collector."

Also receipted tax bill for the year 1858. Date of receipt, September 1st, 1858; "James F. Halliday, collector."

Also receipted tax bill for the year 1859. Date of receipt, January 5th, 1860; "James F. Halliday, collector."

Also receipted tax bill for the year 1860. Date of payment, September 1st, 1860; signed, "James F. Halliday, collector."

Also receipted tax bill for the year 1861. Date of receipt, September the 1st, 1862; "William Dickson, collector."

Also receipted tax bill for the year 1862. Received payment September 30th, 1862; "William Dickson, collector."

Also receipted tax bill for year 1863. Date of payment, September 30th, 1863; signed, "William Dickson, collector."

Also receipted tax bill for the year 1864. Paid Sept. 30th, 1864; signed, "William Dickson, collector."

Also receipted tax bill for the year 1865. Date of payment August 31st, 1865; "William Dickson, collector."

Also receipted tax bill for the year 1866. Date of receipt, October 29, 1866; "William Dickson, collector."

Also receipted tax bill for the year 1867. Date of payment, December 14th, 1867; "William D. Bramhall, for A. G. Hall, collector."

Also receipted tax bill for the year 1868. Paid December the 4th, 1868; signed, "A. G. Hall, collector."

Also receipted tax bill for the year 1869. Paid December 31st, 1869; "M. Frank Kelly, for F. A. Boswell, collector."

Also receipted tax bill for the year 1870. Paid November 18th, 1870; signed, "F. A. Boswell, collector."

Also receipted tax bill for the year 1871. Paid November 25th, 1871; "William H. Slater, collector, by Bramhall."

Also receipted tax bill for the year 1872. Paid September 21st, 1872; "William Bramhall, deputy collector."

Q. Also receipted tax bill for the year ending June 30th, 1874. Paid August 28th, 1873; "William H. Slater, collector."

Also receipted tax bill for the year ending June 30th, 1875. Paid July 29th, 1874; signed, "John F. Cook, collector."

Q. Now, I will ask you where you got those tax bills. A. Out of the box.

Q. Whose box was it? A. My father's.

Q. Your father's box? A. Yes, sir; where he kept——

Q. Where he kept all his papers? A. Where he kept all his papers.

Q. And after his death you found these, except those that came since his death, up to 1867? A. Yes, sir.

Q. Who was Eliza Barry? A. My mother; my father's wife.

64 Q. Where did you get the tax bills that were made out in her name; I notice that two or three of these tax bills are made out to Eliza Barry? A. That was after my father's death.

Q. Who brought these tax bills here this morning? A. Miss Anna Barry. I brought them in a bag.

Q. The tax bills that were made out in your mother's name were paid by whom? A. By her agent, I expect; but ma paid it out of her own means, by her check, out of the Washington bank.

Q. In other words, she paid the taxes? A. Certainly my mother paid the taxes.

Q. Either through her agents or her friends? A. Yes, sir.

Q. Is she living or dead? A. She is living.

Q. Where did you get these tax bills? Well, I don't know where the tax bills came from, you know.

Q. I mean when you brought them here this morning, where did you get them? A. Out of the aforesaid box, where she keeps all her papers.

Q. Are you willing to leave these tax bills for the purpose of being filed in this case? A. No; I don't see the sense of it, if I should leave them here. (After hesitating:) No; I am not willing to permit them to be filed in this case.

Gen. ROLLER: Now, I offer in evidence the tax bills described, purporting to be receipted tax bills for the payment of taxes on the property described in this suit and other property from the year 1853 down to the year 1875, made out in the name of Richard Barry, for

the most part, and lastly, for one year, in the name of his wife, Eliza Barry, and others, and one year in the name of Richard Barry's estate.

Mr. SIMMONS: I object to the tax bills going in evidence for the reason that it is not material to the issue in this case.

NOTE.—It is stipulated and agreed by and between the solicitors that the original tax bills offered in evidence may be retained by Miss Barry until the hearing of this case, and it is also agreed that certified copies of the same may be filed with her testimony in this case, to have the same force and effect as the originals would have if filed, provided the originals cannot be obtained at the hearing.

Cross-examination.

By Mr. SIMMONS:

Q. I simply want to know if you saw any of these bills paid? A. Why, I was too young then; no, I don't know.

Q. And as to they being paid by your father and mother, you only know from what they told you? A. Yes; I only know that they are very honest people.

NOTE.—By agreement of counsel and the witness, the examiner was instructed and authorized to sign the witness' name to her foregoing deposition.

ANNA M. BARRY,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

65 Thereupon GEORGE F. SCHAYER, a witness produced on the part of the defendants, being first duly sworn according to law, was examined and testified as follows:

Direct examination.

By Gen. ROLLER:

Q. State your age, residence, and what official position is held by you. A. My name is George F. Schayer; I am 59 years old, and am now employed and have been for many years deputy recorder of deeds.

Q. When did you become first connected with the recorder's office? A. I only occupied one position, as deputy, since nearly twenty-six years ago; I first became so.

Q. Are there any officials in the office that were in it when you came in 26 years ago? A. No, sir; none here now.

Q. Are any of the officers living who were with you in office twenty-six years ago? A. Yes; the recorder at the time is still living.

Q. Give his name, please. A. Mr. S. Wolf.

Q. Where are the other officers who were with you in office, whether living or dead? A. Well, I don't know what officers; I was one, one deputy, and the clerk and the copyists; I have lost sight and track of them; I suppose they are dead.

Q. Are you familiar with the records of the office? A. Certainly.

Q. Is there or not among the records of your office a record of sales of delinquent lands prior to the year 1873—lands sold for non-payment of taxes in the District of Columbia? A. Do you mean tax-sales records previous to 1873?

Q. Yes, sir. A. I don't know how long; there was tax deeds recorded all along.

Q. I refer to the report of sales made by the officers who conducted the sales of land for delinquent taxes. A. I don't know of any previous to 1878.

Q. When did the recorder's office become a separate and distinct office, disconnected from the office of the supreme court of the District of Columbia and from that of the circuit court of the county of Washington? A. By the act of 1863, I think; how soon after, I don't know; but in 1864, I think.

Q. Are you able to say whether or not this office received from the clerk of the office which preceded it all the records that belonged to it without exception, or are you only able to state—— —. (Interposing.) I could only say since I have been officially connected with the office, from April, 1869.

Q. Can you say whether or not there was ever any book in which there was kept a record of sales of land delinquent for the non-payment of taxes in the District of Columbia in the office of the supreme court of the District of Columbia or of the circuit court of the county of Washington, which preceded this office? A. I could not.

66 Q. Are you able to state whether or not there was ever in existence any such book, or are you merely able to say that no such book can be found now in the office? A. That is all I could say; that there is no such book now.

Q. Is there any official living who is connected with the office which preceded this who could say positively whether or not there was ever any such book in existence that you know of? A. Let me see; there is Mr. Meigs, the assistant clerk, upstairs; his official tenure precedes mine, sir, by four or five years.

Q. Do you know any other besides Mr. Meigs? A. Well, Judge Wylie, retired judge.

Q. Is he a man of sound mind? A. Oh, yes; as far as I know; I haven't seen him lately.

Q. When was a list of transfers made out at this office and certified to the tax office? A. At the end of each year. The beginning of every calendar year the transfers are supplied to the tax office.

Q. That is on the 1st Monday of January of each year? A.

Yes, sir; of the transfers during the peceding year are reported to the tax office.

Q. You don't certify them on the first Monday in July? A. No, sir; we took them up at the end of the year; we have sent them over, but they send them back again; the bill is collected semi-annually. The transfers are made right along during the year, and at the end of each half a year the books are sent over there and verified, and the bill paid accordingly, and then the books are sent back here again, and continued to the end of the year, and at the end of the year they — kept over there altogether.

Q. For the purpose of making transfers on the land books there? A. Yes, sir; for the purpose of posting up their own books.

Q. Did they not keep the books long enough in July to make transfers on the assessment books? A. They did not keep them there any; they sent occasionally for the books if they needed any reference to it, but they got them at the beginning of each year.

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Schayer, are there any records that have been lost in your office that you know of? A. No.

Q. Is it not a fact that all the records that you received from the old circuit court are now here in your office? A. That I could not tell; the records that then were here are here now, with the additions that have been made during my tenure.

Q. It is generally understood that all the records you received from the old circuit court are now in existence in your office?

Gen. ROLLER: I object to that as incompetent and inadmissible.

A. The record books that were here when I entered upon the position are still here.

67 Q. Do you know if there is any missing now? A. No, sir.

Q. Is it not generally understood that there was no report made by the tax collector of tax sales of the District of Columbia made to the recorder of deeds prior to 1878?

Gen. ROLLER: Objected to as inadmissible and incompetent.

A. It was so understood.

Q. And is so understood? A. And is so understood.

Redirect examination.

By Gen. ROLLER:

Q. By whom is it so understood, Mr. Schayer? A. Well, by all who have examined the records; by all examiners, as far as I know, it is generally understood.

Q. That is, these examiners can find no such record? A. They can find no such record.

Q. And hence they make the inference from that fact that none were made? A. Yes, sir.

NOTE.—By agreement of counsel and the witness the examiner was authorized and instructed to sign the witness' name to his foregoing deposition.

GEORGE F. SCHAYER,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

Thereupon JOHN E. ROLLER, one of the defendants and a witness in his own behalf, being first duly sworn according to law, testified as follows:

Mr. SIMMONS: Counsel for the complainants reserves the right to object to any part of the statement made by the defendant Roller.

The WITNESS: I became the owner of these lots, 8, 9, and 10, in square 1028, in the fall of 1887. My first connection with them began in July, 1875, at which time a suit was brought by W. H. Triplett, in the circuit court of the county of Shenandoah, Virginia, against George C. Wedderburn and others, claiming that he, Triplett, had been wronged or defrauded in the transaction between himself and Wedderburn and one M. H. N. Kendig; that he, Triplett, was entitled to re-cis-ion of the contract under which he had received ten acres of land lying near Woodstock, in Shenandoah county, from those gentlemen and had received a conveyance from the heirs of Richard Barry *from* the lots in question in Washington city. I was employed by Wedderburn and Kendig to defend that suit and filed their answers and took the depositions that were taken in Virginia, and attended the taking of depositions in the city of Washington, and we had a protracted and animated controversy over the matter, which was settled by decree rendered about 1881 or 1882. That decree was subsequently made the subject of a rehearing, and a decree of reference was made to a master to as-
68 certain and state certain accounts that had become necessary by reason of the court's decree; so that a final decree was not made in the case until January, 1888. The result of that litigation was that Triplett was given back his property in Virginia, and Wedderburn and Kendig were allowed to take the Washington City property, provided they would pay back to Triplett the boot money and also the taxes that had been paid by him from 1875 down to the time of the redemption, with the rate of interest, ten per cent., allowed in the District of Columbia for such redemption from taxes. Wedderburn and Kendig had counsel in this suit, one John Ambler Smith, who took no part, however, in the case in Virginia, but simply guarded their interests here and conducted some of the correspondence.

In order to assure my clients of the condition of things I caused the deed, which the court directed Irving and Triplett, or rather I should say Irving, because Triplett had conveyed the lots in Washington to Irving, to make and lodge in the papers in the chancery cause there in escrow, to be delivered to the defendants or their attorneys when the redemption money had been paid; that deed I caused Irving to make to Smith and lodged it in the papers in the case. Neither Wedderburn, nor Kendig, nor Smith had the money to redeem the property, and suggestion was made to me that I might have the privilege of redemption, provided I would pay the money and release them *and release them* from fees. I paid, as a result of that arrangement, something over four thousand dollars. The exact amount I do not now remember. In that way I came to know all about the condition of the lots, so far as the payment of taxes were concerned, from 1875 down to 1887. Most of these taxes had been paid by Triplett or Irving for several years (I think as many as three). The taxes were delinquent, and the land had been sold and bought in by the District of Columbia, but were redeemed by Irving, and I subsequently repaid him that money necessary to reimburse him, with ten per cent. interest. During the pendency of that litigation, from 1875 to 1887, I was in Washington frequently. I had an aunt who lived on Capitol Hill, not very far from the property, and I made it my business to look after those lots and to see that they were not depredated upon or interfered with, though, of course, I took no steps to enclose them or utilize them in any way, though I simply paid visits to them and watched them as an owner would do. In that way I came to know Mr. Meyers. I knew him before I became the owner of the property. After I became the owner of the property I got Mr. George R. Arrington, who was a resident of the city up to last winter, but who, I am told, has moved to Georgia, to build a fence for me around the lots. That is the first time they were enclosed during my knowledge of them, and then I got Mr. Meyers to watch the fence and keep it up, giving him in return for his services in that particular the use of the lots for the pasture of his horses, or rather the use of it as an outlet in which to turn his horses, and he used it for that purpose up to the spring — 1892, but
69 the exact date I do not know. In the summer of that year I paid a visit to the lots, and was surprised to find that the fence had been destroyed, and that the lots that were formerly from one to ten feet below grade had been filled up above the level of Maryland avenue from loose earth taken from some lot above, as was evident from the tracks of the wagons and the direction from which carts had seemed to have come, and the appearance of the lot from which the dirt had *be* been removed. The earth has since sunk down until it is now about on a level. Later on, in the fall of that year, I was surprised to find a fence around it. I inquired of Mr. Meyers who had done this trespassing on my property, and was told that Mrs. Moulder and Gummer, contractors, had gotten permission from Mr. Walter——

Mr. SIMMONS: I object to all this testimony as to what he was told as hearsay.

A. (Continuing:)—to fill up the lots, and that Mr. Walter and some coachman with him had built the fence. As the lots were then in litigation in the equity court, I knew that such forcible entry in taking possession of them amounted to nothing, and I never concerned myself much about it. But on my visits there within the last week I find that the lots are open again to the commons, and I went over them in every direction without let or hindrance from anybody. I am in possession of those lots today, as I claim. I was certainly in possession of them when the first equity cause decided by Judge Hagner, No. 14,468, was instituted and decided by him. Recurring to the litigation in Woodstock, Virginia, between Triplett and Wedderburn and others, I would say that during the course of that investigation an abstract of title which had been given by one W. H. Ward, a practitioner of this city——

Mr. SIMMONS: I object to any statement of what Mr. Ward did, unless the abstract is produced.

A. (Continuing)—was filed in the court in which Mr. Ward expressed an opinion that the title, though a tax title, could not be interfered with. That abstract of title is missing from the papers. I don't know why it can't be found. I have looked for it, but I will file with this deposition Doctor Triplett's own deposition. He was my antagonist in that case, in which it will appear that he admitted the fact——

Mr. SIMMONS: I object to the filing of any deposition taken outside of this case.

A. (Continuing:) During all these years I never heard of any claimant for these lots other than the parties who are thus fiercely contesting with each other for nearly thirteen years. I have paid all taxes since I have been the owner, except the present year and except the year 1890, which by some oversight was overlooked, and for which the lots were improperly so returned delinquent in the name of Joseph S. Irving, and were purchased by Mr. Allen C.
70 Clark. In January, 1894, I sent $90.42, which was the exact amount of the taxes, interest, costs, and penalty, to my brother, W. W. Roller, with instructions to tender the same to Mr. Clark and demand an acquittance or release from this tax purchase of his. The result is shown by the paper which I filed this morning with the deposition of Mr. Loving. I was not present when the tender was made, and know nothing about what was done at that time. I would have paid the taxes for this year, but the lots have been transferred, by what right or authority I don't know, from my name to either Lydia Hoagland, or Bartow L. Walker, I think to the latter name. This was an improper transfer, and I shall take steps to set it right. Just here I wish to say in reference to the fact

that I will show on the records that I am and have been attorney for the heirs of James Ward Scott, Jr.; that when I first became their counsel I explained my relations to lots 8, 9, and 10, in square 1028, to them, and they understood my relations to those lots, and our dealings with each other have been upon the fullest disclosure on my part of my claim to these lots.

Mr. SIMMONS: I object to that latter statement on the ground that the Scott heirs are not present, and no contract or written evidence has been introduced or shown that any such statement or agreement were made or that the heirs know of any such statement or agreement.

A. (Continuing:) I have given the names and residence of the Scott heirs to every attorney of this city who has asked me for them. I have already given them in my deposition in this case, and, if anybody desires, they are at perfect liberty to send to them for the accounts of the pendency of this suit and of my connection with it. In reference to the death of John Young, the bill states that it occurred in 1823. This is an error, as I know that from repute in the Young family, especially those living in Loudon county and Adams county, in Ohio, with whom I have had some communication——

Mr. SIMMONS: I object to all this as hearsay and incompetent, in relation to the death of John Young.

A. (Continuing:) He died in 1803, as will appear both from the records of the District and of Loudon county, too, as well as from the repute in the family. I argued *in propria persona* the case of Allen C. Clark *vs.* Lydia Hoagland *et al.*, equity, 14468, before Judge Hagner.

Mr. SIMMONS: I object to any statement relating to that case. The record itself will show.

A. (Continuing:) And argued it upon the merits of the case which were raised by the demurrer to the bill. The decree dismissing that case was passed upon the merits of the case and dismissed the bill upon the merits.

71 Cross-examination.

By Mr. SIMMONS:

Q. General, as to the dismissal of the bill in Clark *vs.* Hoagland, was it not solely on the ground of multifariousness? A. Judge Hagner informed me distinctly that he sustained my contention that the complainants had been guilty of laches and were not entitled to relief in equity. He also said that he was of opinion that there could be no bill maintained in a court of equity for partition of lands to which the legal title was not clear. He made no refer-

nce that I heard to multifariousness. I don't think he gave his decision on that ground at all.

Q. Was not one of the grounds in your demurrer multifariousness? A. It was not. We have a copy of the demurrer here and it speaks for itself.

Q. Now, General, I want to ask you this: What interest had you in this land in 1875? A. None in the world until after the institution of that suit, and I had no interest in it then.

Q. What suit do you refer to? A. The suit in the circuit court of Shenandoah county, and I had no interest in it then, except that I saw from the beginning that if Doctor Triplett sustained his allegations against Wedderburn and Kendig that they would be compelled to give up Triplett's land in Virginia to Triplett, and they be compelled to take the land in Washington and pay the boot money back to them, and I looked to it as a source from which I could get a fee.

Q. Then, you took this land for a debt, did you not? A. I took the land for the redemption money and my fee added in.

Q. What was the redemption money? A. Nearly four thousand dollars.

Q. Did you pay nearly four thousand dollars in cash for this land? A. I surely did.

Q. You say there that the land was conveyed to Irving. What interest had Irving in the land? A. Irving was a near relative of Triplett. Triplett was without means to carry on his operations as largely as he desired. Irving joined him in the purchase of this land, and either took a hand interest in it or furnished him some money and took a deed for it.

Q. Then, what did you get for your services, if you paid four thousand dollars for the land? A. I got nothing in the world, except what I could get for the land over and above the amount I paid for it.

Q. Was Smith ever paid anything for his services? A. The matter stood just this way: Smith was to have something, but after it was found to be a tax title which the title examiners would not pass, and on which I could not get a loan, although the money was loaned to me with the assurance that I would give a trust deed or mortgage upon these lots. I then had to make other arrangements at a very great inconvenience and sacrifice on my part, because I had already gotten the money, and my good faith required
72 that it should be returned, as I could not comply, and in view of this changed condition of things Smith surrendered any claim that he had, any right to share in the redemption, if the lots were ever redeemed, or to a sale of the lots and a division, or to the participation in any profit.

Q. You say you were looking after the land when your aunt was living here. What time was that? A. That began in 1878. I should have said that it was an aunt of my wife, and I was married in July, 1878.

Q. What interest did you have in looking after it at that date? A. Nothing in the world, except, as I explained before, it seemed to me that as Triplett was a resident of Shenandoah county, and Wedderburn and Kendig were non-residents, that Triplett had the advantage in having the case at home—in his own home court—and that the result of the litigation would be that Wedderburn and Kendig would have to pay for the Washington property.

Q. In the event that you would get it? A. No, sir; that I would have an interest in that property, because it would be their property, and I would be charged with a fee.

Q. Now, General, how did you pay this four thousand dollars—by check? A. I paid it by check or draft on Philadelphia; I am not sure which. The amount paid by me November, 1887, was $3,677.06. Subsequent to that date I paid $115.16 more, making $3,792.42. Later I paid some further items of costs. In addition to that then I paid the Real Estate Title Insurance Company, for the examination of the title, $25.00. I paid Tyler & Rutherford for their report upon the valuation $10, and I paid some accrued taxes amounting to some $75 or $80, and some additional costs amounting to *amount* $75 or $80.

Q. The money that you paid to Ashford and Tyler & Rutherford was paid for the purpose of obtaining a loan on the property? A. Yes, sir.

Q. Whom did you pay this money to—this $3,800? A. I paid it to Doctor Joseph S. Irving, of the town of Woodstock.

Q. He is the man that the title was in at that time? A. Yes, sir.

Q. You don't know whether you paid it by check or draft? A. I am not sure whether I paid it by check or draft. It was paid in this way. I had to go to Philadelphia to get it from a friend there, and I had to be in Woodstock in order to get there within the time for redemption, on the day after the election in the fall of 1887. I left Philadelphia on election day and got back to Woodstock in the morning, after traveling all night or part of the night, and paid Doctor Irving that morning, but whether I brought a draft with me from Philadelphia or whether I gave him a check on my own bank I can't remember now. I could tell very quickly at home, but it was a noted transaction and was well known to al- the officers. Every officer in the court had his fees to get out of it. It was known to Doctor Irving; it was known to his counsel, General
73 James H. Williams; known to my partner at Woodstock, W. W. Logan, and known to Doctor Irving's sons, two of whom live in Woodstock.

Q. General, you have stated that certain parties built a fence around this land while a suit was pending; what suit do you refer to. You stated that the fence was built around there by a man by the name of Walter and his coachman at the time the suit was pending, and you paid no attention to it because it was taken possession of legally while the suit was then pending in court? What

suit do you refer to? A. The only suit I refer to is Clark against Hoagland.

Q. Is not it true that the suit had not been filed at the time the fence was built in the fall of 1892? A. You may be right about that, but it was certainly pending at the time I first knew the fence; at least that's my recollection.

Q. You say the lot was a great deal below the grade. Now, I want you to be positive about that. Was it two feet below the grade at the Thirteenth Street side? A. It was very little below the grade next to the street all around, especially next to Thirteenth street and F street, but it ran to a ravine like in the center, and there it was very considerably below the grade.

Q. Was there any ravine there? Was not it simply a bottom with grass growing in it, where the horses stayed? A. It was not a wash, but it was something like a little valley.

Q. A low place in the land? A. Yes, sir.

Q. Now, was any part of it ten feet below the grade? A. Yes; I should think at the lowest point it was ten feet at least.

Q. That was down towards Fourteenth street? A. It was, sir; I might be mistaken about that; of course these things are things that one man will differ about with others.

Q. When you saw that fence in 1892, was not it a good, substantial fence? At the time the suits were pending was not it a good, substantial fence? A. Frankly, I don't think it was.

Q. What kind of fence was it? A. It was a fence with pine posts, that's my recollection, though I am not sure of that, with two planks around it, the first some distance from the ground, the second a foot above the ground, so that persons could get into it easily by climbing over it or through it, but cattle could not.

Q. Was not it a fence that would call anybody's attention to the fact that the land was enclosed? A. It would serve that purpose, I think.

Q. Now, I want to ask you might it not be possible that they were cedar posts and there was a three-plank fence around it of twelve-inch boards? A. It might be possible. I don't remember about the posts; I think I have a good recollection about the boards.

Q. General, you represent the heirs of James Ward Scott in other suits here, do you? A. I do. I represent their interests in all lots claimed by them in this city.

Q. General, are you the same party who was the defendant to a certain suit known as Caruthers *et al. vs.* Smith *et al.*, law, No. 27147? A. Yes, sir.

74 Q. And you filed an answer in that case to the *scire facias* issued out of that court against you as terre-tenant. A. Yes, sir; I am the same person.

Q. Do you remember in that answer stating that moreover the said Irving never had any legal title to the land for the reason that it was a tax title, but the title had been conveyed to you by certain

heirs of the survivor of Beall and Gantt? A. The record in that case will show exactly what I said.

Q. Have you a copy of the record? A. I have a printed copy in my hand, and will hand the same to you (handing same to counsel).

Q. Will you please read from page 5, at the top line, down to the signature of John E. Roller of that answer? A. (Reading:)

"That, moreover, the legal title to said lots of land never was in the said Irving, nor in the persons in whose names the lots were assessed and sold for taxes, but was in the heirs-at-law of Thomas Beall, deceased, who was the survivor of himself and John Mackall, the trustees of the original proprietors of the District of Columbia, and these heirs have conveyed said title to this respondent by deed dated the first day of March, 1889, and recorded in the land records of this District, in Liber No. 1548, folio 481, *et seq.*

"Having answered, he prays to be hence dismissed with his costs.

JOHN E. ROLLER."

NOTE.—An objection is noted to the carving out of a part of the record and its introduction into this case. If any part is to be introduced, the whole should be introduced.

Mr. SIMMONS: Counsel for the complainants simply want to show that the facts stated in the answer of the defendant Roller to the suit mentioned, Caruthers *et al. vs.* Smith *et al.*, is an opinion of his own title, and only introduces that part of the answer which makes such statements for such purposes.

The WITNESS: I wish to add this as due to myself, that, as I understand and believe, under conveyances made from the original proprietors to J. M. Gantt and Thomas Beall, of Geo., the legal title to all the lands in the District of Columbia were vested in these two men as trustees for certain purposes, to wit: First, that they should convey to the Commissioners of the District of Columbia all lots that were chosen by the Government and wanted by the Government for its purposes, either for reservations, for the buildings of the Capitol, or the President's house, or any other public building, or for public squares for the use of the city, or for streets and alleys throughout the city; and, second, to convey back to the original proprietors, after the Government had taken what it wanted, the residue of the property thus conveyed by these original proprietors to those trustees; and, if I understand anything and can read the records of this District aright, that conveyance has never been made either by J. M. Gantt, or Thomas Beall, or the heirs of Thomas Beall, survivor of those trustees, and that the naked, legal title stands today in
75 the heirs of Thomas Beall, except so far as they have made the conveyances to me, and I obtained the conveyance from the heirs of Thomas Beall of that legal title, and it will prevail in the court of law, in my opinion.

Mr. SIMMONS: Counsel for the complainants now offers in evidence a deed from Thomas Beall, of Geo., and John M. Gantt, of George-

own, Montgomery county, State of Maryland, of the one part, and Gustavus Scott, William Thornton, and Alexander White, the commissioners appointed under act of Congress entitled "An act for establishing the temporary and permanent seat of the Government of the United States," of the other part, conveying all the land which they received from the original proprietors.

NOTE.—And the same is filed by the examiner, marked Exhibit J. A. L. No. 6.

The WITNESS: I will say this much further, that if that deed is a conveyance by Thomas Beall, of George—, and John M. Gantt, to the Commissioners of the District of Columbia for the parts of these lands that belonged to the original proprietors and which the Government did not desire for its purposes, then it is not in accordance with the original trust under which Beall and Gantt received the conveyances from the original proprietors, as that original trust required them to convey those lots back to the owners themselves, as I understand it.

Q. You said that these lots were sold to Mr. Clark in 1891 for taxes. A. Yes, sir; I have so stated.

Q. You did not offer to redeem those lots until after two years had elapsed? A. I think that true, sir; on the 17th of January, 1894, is the date of the paper signed by Mr. Clark which my brother turned over to me.

NOTE.—By agreement of counsel and the witness, the examiner was authorized and instructed to sign the witness' name to the foregoing deposition.

JOHN E. ROLLER,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

Thereupon DOUGLASS S. MACKALL, produced as a witness on the part of the defendants, being first duly sworn according to law, was examined and testified as follows:

By Gen. ROLLER:

Q. State your age, residence, and occupation. A. Thirty-one years old; lawyer: place of business, in the District of Columbia.

Q. State whether or not you had any knowledge of the pendency of the suit of Allen C. Clark *vs.* Lydia Hoagland and others, equity, No. 14468, involving lots 8, 9, and 10, square 1028. A. I did.

Mr. SIMMONS: I object to that as being immaterial and irrelevant.

Q. State whether or not you knew of the filing of the demurrer in that suit by John E. Roller, and of the case being set down for hearing upon the demurrer, and of the fact that the same was tried; and, if so, state before whom it was tried. A. I have knowledge of the fact of being associated as counsel for General

Roller in that case. I had actual knowledge of the filing of the bill and of the filing of the demurrer, and also arranged the time as to when that demurrer should be heard, and appeared at the dates set for the hearing with General Roller before Justice Hagner, and the case was heard on that day on the demurrer to the bill interposed by General Roller, and argued by Mr. Davis, on the one side, and General Roller, on the other.

Q. Were you present in court on the day that the case was decided by Judge Hagner? A. A day or two after the case had been argued and submitted I went in to see Judge Hagner to ascertain what his decision was——

Mr. SIMMONS: I object to all this. The record will show, and the counsel has no right to state the opinion of the court.

A. (Continuing:) He told me that either that day or the day before he had prepared to sign an order which I examined, and which is on file in the records of that case. I thereupon particularly inquired of the judge on what grounds he had sustained the demurrer. He expressly stated to me then that the grounds were laches, and the other grounds set up in the bill.

By Mr. SIMMONS:

Q. What were the other grounds? A. One of them, as I remember, was the jurisdiction of the court; another was the multifariousness of the bill.

Gen. ROLLER: The demurrer will speak for itself as to what the grounds were. The question interposed by Mr. Simmons is objected to, and the answer is objected to. The demurrer will speak for itself.

By Gen. ROLLER:

Q. Did you make this inquiry of which you spoke on the day on which the decision was rendered and the decree entered? Is that your best recollection or not? A. To the best of my knowledge, it was done on that very day.

Q. And before the judge left the bench? A. Yes, sir.

Cross-examination.

By Mr. SIMMONS:

Q. Mr. Mackall, what was the purpose of that bill filed by Mr. Clark? A. Well, of course, the bill is the best evidence of the purpose of it. I can only state my opinion as to the matter.

Q. You have examined the bill, and you have attempted to testify about what was done, and I would like to know what was the purpose of the bill? A. As I understand it, it was a bill filed
77 for the purpose of selling the real estate described in this suit, or for the purpose of partition. In other words, it was a

bill filed for partition, either by the sale of the property and dividing the proceeds or otherwise, as the court might deem best.

Q. Was not a bill also filed against Mr. Roller for the purpose of setting aside the tax sale to him? A. General Roller was a defendant, and I believe the bill also set up his tax title and prayed that the same might be annulled or set aside, something of that kind.

Q. And your defense set up was laches relating to the setting aside of the deed, and multifariouness, was it not? A. If you will let me see the demurrer I can be more positive. I know that laches was one of the questions that was raised on demurrer and argued.

Q. That was the principal question? A. Yes, sir. One of the principal questions raised and argued on the demurrer was the question of laches. In other words, whether or not the complainant should be permitted to maintain his bill against the defendant.

Q. Against what defendant? A. General Roller filed a demurrer because of laches on the part of the complainant.

Q. Did you not, as a matter of fact, set up also, as grounds of demurrer, multifariousness—did you not set up multifariousness as ground for demurrer?

Gen. ROLLER: Question objected to as not calling for the best evidence; the demurrer will speak for itself.

A. (Continuing:) From looking at the demurrer I do not find that that was a ground assigned. I probably got that idea from another demurrer that was filed by you.

Q. Did you not, as a matter of fact, set up multifariousness as a ground for your demurrer also, or attempt to set it up at the hearing? A. I can't state, Mr. Simmons, anything more on that point, except what the demurrer shows. I am unable to state. I did not argue the case myself. I know this, that one of the main questions discussed by General Roller was the question of laches, and I know that Judge Hagner, in deciding the case, based his decision on that ground. Now, whether or not the question of multifariousness was argued by General Roller, I don't even know that.

Q. Are you sure that it was not? A. No; I said that I don't know.

Q. Might it have been? A. Certainly it might have been.

Q. Don't you think it probable that it was? A. I don't think anything about it. I know that General Roller relied, as I have stated, on the laches of the complainants. He may have made other points, and very probably did, in his argument.

Q. At the first beginning of this present suit, Mr. Mackall—of course, I suppose you are familiar with it—do you know if General Roller was made a party to the suit? A. I think he was not.

Q. Do you think he went in on his own application and asked that he be made party? A. I know that he did.

78 NOTE.—By agreement of counsel and the witness, the examiner was authorized and instructed to sign the witness' name to his forgeoing deposition.

DOUGLASS S. MACKALL,
By J. ARTHUR LYNHAM,
Examiner in Chancery.

Filed January 7, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORN ET AL.
} In Equity. No. 15141.

Depositions for Defendant John E. Roller.

The parties to the above-entitled cause met at 11 o'clock a. m. Thursday, February 28, 1895, at the office of Mackall and Maedel, No. 416 Fifth street N. W., Washington, D. C., for the purpose of taking depositions on behalf of defendant John E. Roller.

Present: Mr. John R. Roller, *in pro. per.*, and Mr. D. S. Mackall, on behalf of defendant Roller; Mr. Leon Simmons, representing the plaintiffs and certain defendants.

Whereupon WILLIAM MYERS, a witness of lawful age called by and on behalf of defendant Roller, having been duly sworn, is examined—

By Mr. ROLLER:

Q. State your age, residence, and occupation. A. I have been living on Maryland avenue for about 11 years, at No. 1323. I own property in the square 1028. I am 37 years old this coming birthday. I am a teamster, contractor, and in the sand business.

Q. Do you know lots 8, 9, and 10, in square 1028; if so, how long have you known them? A. I have known them for the last 25 years.

Q. Do you know the defendant John E. Roller? If so how long have you known him? A. I have known him about seven or eight years, as close as I can remember.

Q. State whether or not you know of those lots having been enclosed; if so, when and under what circumstances.

Mr. SIMMONS: I object to the question as leading.

A. This space has been enclosed, as close as I can come to it, since 1887 up to 1892. In 1892, in the spring of the year, the fence was torn up by Mr. Moulder (now dead) and Mr. Gummer, contractors;

Mr. Gummer is doing sewer-work for the District. They cut down the hill between E and F and between 13th and 14th in 1892, in the spring of the year, and piled up the material of which the
79 fence had been made, and drivers and one person and another burned the materials and made tail-boards out of them, and in 1892, in the fall of the year, it was closed in by Mr. Davis' brother-in-law and a colored man that drives his family carriage that goes around to different places.

Q. What Davis do you refer to? A. He keeps a restaurant out northeast.

Q. On H street, do you mean? A. Yes, sir; I loaned them the crow-bar to dig post-holes. I built a stable about the same time.

Q. Do you know his first name? A. I could easy find his name, but I don't know the man's name. He is with that real-estate man that claims the place; he just went with him about that time.

Q. Who is that? A. I mean the man on F street.

Q. Mr. John H. Walter? A. Yes, sir.

Q. By whom was this fence built around these lots in 1887? A. It was built by Mr. Arrington. When he put that fence up I went to see him; he was the owner of that piece of ground, and I wanted to find out if I could get possession of it if I would keep it enclosed and keep people from tearing the fence down, so I could put my horses in. So he told me he would let me take it. I don't know whether he wrote to you or not, but you came out shortly after that and I talked to you, and you told me, "Yes," if I kept that place enclosed, and whenever there is a board comes loose fix it and keep it in repair, you would allow me to put the horses in there.

Q. Did you or not keep your horses in the lots? A. I kept the horses in there up to 1892, and the Big Four Pie Company kept their horses in there for a year, and John Minnis, and Martin also, kept their horses in there.

Q. Did you or not give these parties permission to keep their horses in the lots under your agreement? A. Yes, sir. And there is another man kept his horses in there by the name of Henry Minor.

Q. Did he or not have permission from you, under your agreement with Roller? A. Yes, sir.

Q. Did you or not keep the fences in repair under your contract, in return for the use of the lot by you and those claiming under you? A. Well, I had to keep the fences in repair to keep the horses in there, because you can't leave a horse run out at large right in the city.

Q. Is or not this property in full view from Maryland avenue and F and 13th streets? A. Yes, sir.

Q. Was or was not that occupation of that property by you and those who used it under you in full view of all passers-by on both of the streets named during that time? A. Yes, sir.

Q. State whether or not John E. Roller ever came to you prior to the building of that fence and made inquiries of you in regard to

the lots, their value, condition, &c. A. Yes, sir; he has been out there some two or three times.

80 Q. How soon after you first went to square 1028 did he first come to see you and talk with you about that?

Mr. SIMMONS: I object to the question as being immaterial and irrelevant.

A. Well, I have been living in that square about 11 years.

Q. How soon after you first went there did Roller come to see you? A. I couldn't very well tell.

Q. Was it or not as long ago as nine or ten years? A. Somewhere in that neighborhood, but I couldn't tell exactly. I never had no thoughts that I would ever be brought up about it.

Q. Did Mr. Roller or not, in his first interview with you, always thereafter claim to be the owner of the lots? A. Oh, yes. If I had had your address I would have wrote to you when the fence was taken down, but I didn't have it, and so when the fence was taken down and this other fence was put in right afterwards and you came out to see me I told you I would let you know if I had your address; but I didn't have it, and I thought maybe you had sold it and that everything was all right.

Q. When you first knew these lots was or was not the body of them below grade? A. Yes, sir; about ten foot; the pegs were down about ten foot.

Q. Was there or not a large drain through the lots? A. Yes, sir. I can go down about ten foot and pull up the surveyor's pegs for marking the line for the first house built in that square, on the corner of 13th and Maryland avenue, right inside of that lot.

Q. Did or did not the water from the lots and further up the hill drain down through those lots? A. Yes, sir; drained right in the Big Four Pie Company; and I had to put a sewer back a hundred and fifty feet to drain the water off; I was flooded there about 6 or 7 feet.

Q. Did or did not that drain the water down through lots 8, 9, and 10 and thence on below? A. Yes, sir.

Q. After Moulder and Gummer had torn down the fence and removed the material from some lots on F street on these lots, how did that leave the grade on those lots as compared with the street? A. I think it is very near level with Maryland avenue.

Q. That is the way it stands at present, is it, or not? A. Yes, sir.

Q. How long did the fence put there by Davis' brother-in-law and his coachman continue in good repair—that is, with an actual enclosure clear around the whole property? A. I suppose about nine months.

Q. Since that period has or has not there been an actual enclosure around the whole property, since the nine months? A. In the fall of 1892 they put that fence up, and after they put it up they

came out two or three times and looked after it, and after that different people around there would take and jump on the fence and tear it down, and drivers would take boards and burn them up. So the fence has been down about a year and a half, or something like that.

Q. How does it stand today? A. In bad condition.

Q. Is there any fence on the east side of the lots? A. No; no fence there.

Q. Are there any breaks in the fence around the other sides of these lots? A. Yes, sir; breaks on F street, 13th street, and Maryland avenue.

Q. Can parties drive through it or ride through it? A. Yes, sir.

Q. Or enter it on either of these sides without crossing a fence? A. Yes, sir.

Q. When that fence was built in 1892, did it or not include these three lots alone, or did it include lot eleven also? A. In 1892 it enclosed Davis', on Maryland avenue.

Q. What lot do you mean? A. Davis' lot. There is a lot there about 60 foot, I suppose.

Q. Lot No. 11? A. I don't know the number; it is in the same square.

Q. It adjoins these lots fronting on Maryland avenue? A. Yes, sir. They enclose those lots with yours, and then about a month or two months after that Mr. Davis got a man to come up there and put a string of wire around to partition his from yours—in the inside of it.

Q. How many wires did he use? A. Only one.

Q. How many posts did he use? A. Three or four.

Q. How long did that wire partition remain there? A. The colored women that lives in the frame house have been hanging their clothes on it, using it as a clothes-line.

Q. Is it there yet? A. Some of it is there and some of it is down. The horses and cows and one thing another have been running in there and torn that down, part of it.

Q. Did that wire partition remain there any longer than the fence as a whole around all the lots, or did the wire fence disappear? A. The wire fence disappeared about the same time.

Q. What is your estimate of the cost of the fence put there in 1887 by Arrington? A. I think that fence cost about $200 or $175, something like that.

Q. Was it or not a substantial fence? A. Yes, sir.

Cross-examination.

By Mr. SIMMONS:

Q. Did you pay anything for the use of that property? A. No, sir.

Q. You say the property was not on grade at the time you went there? A. No, sir; it was not on grade.

Q. Was there any property on that square on grade? A. No, sir.
Q. The whole square was how much below grade? A. Well, as close as I can come to it, it runs from about ten foot down to
82 nothing; it runs down to the school-house to about nothing—to about a foot, or something like that.
Q. Was F street below grade at that time? A. Yes, sir. That was filled up in 1872; in Shepherd's time that was filled up, and you can see where it was filled.
Q. Could there have been a fence built around these lots at any time since you knew them without any great difficulty? A. I don't exactly understand you.
Q. You say the lots were below grade? A. Yes.
Q. I mean when you first knew this lot do you think a man would have had any trouble in building a fence around to inclose it? A. I don't think they would; no.
Q. Then he could have built a fence easy enough? A. Yes; he could have, easy.
Q. What is the condition of that fence now? A. It is in very bad condition.
Q. You said you could drive through it; are you sure of that? A. Yes, sir; you could drive through that lot and go in almost any side of it.
Q. You cannot drive through on Maryland avenue, can you; is not that side inclosed? A. Well, I know it is either Maryland avenue or F street that you can drive in from. It is pretty close to Maryland avenue that you can drive in, just right near the corner.
Q. Do you know that Arrington built the fence? A. Yes, sir.
Q. Did you see him build it? A. Yes, sir; some of my drivers dug the post holes for him. He gave it out by contract.
Q. When did you put your horses on the lot? A. I put my horses in there about six months, if not longer, after the fence was put up.
Q. Did you not put the horses in there without getting permission from any one? A. No, sir.
Q. When you built that fence I want to know what lots were enclosed. Did you enclose the Davis lot also? A. Mr. Davis closed his fence about six months or a year or so afterwards.
Q. What I mean is, when Arrington built the fence did he not enclose all the lots there at the same time, including the Davis lot? A. No, sir; he didn't enclose Mr. Davis' lot.
Q. How far down Maryland avenue did Arrington's fence run? A. It ran down to Davis' lot. Mr. Davis' lot had a sign-board up about ten or twelve foot high.
Q. How did the fence run then? Did it stop at his sign-board? A. Yes, sir.
Q. How about it in the winter time? Was not that fence broken down and left open in the winter? A. Which fence?
Q. The one Arrington built? A. No, sir.
Q. Did you keep your horses there? A. In the winter time I let

them run at large now and then for exercise. I am so well acquainted around there that no one would disturb anything as long as I had charge of it. If there was a board missing or any-
88 thing I went there and nailed it up; but at the same time the fence was torn down in the spring of 1892 Mr. Davis went and tore his down and gave it to the colored man in the big house right next to his place.

Q. That was in 1892? A. Yes, sir. He gave it to the colored people there next to his place for to tear it down.

Q. These people you have reference to—the Big Four Pie Co., Mr. Minnis, and Mr. Minor—did they not turn their horses in there without asking you? A. No, sir.

Q. None of them? A. No, sir; because they rent from me, and people used to have sick horses, and I told them to turn them in that lot there; that I had the privilege of using that place by keeping the fence up.

Redirect examination.

By Mr. ROLLER:

Q. Did it or not cost you anything to keep up the fence during the time you used it from 1887 to 1892? A. I should think it did. Of course I always had plenty of lumber, because I tear down houses and buildings, and when I have a lot of lumber left they sell it to me, and I used it to keep the fence in repair. I had ten or twelve horses, and the Big Four Pie Co. have got about 8 or 10, and Mr. Minnis has two horses, and Minor had one, and they used to put their horses in there, and whenever they had a sick or lame horse it was put in there for the benefit of their feet; it was good for their feet. They didn't put them in there much for grazing because there was never much grass grown down in that place.

Q. The question was whether it had cost you anything to keep it up? A. Yes, sir; it did cost me. Of course I never kept an account of it.

Q. It cost you something. A. Yes, sir.

Recross-examination.

By Mr. SIMMONS:

Q. There were boards taken off or stolen from the fence while you had it? A. I don't know whether they were stolen off. Now and then a board or two would be missing, but whether the horses knocked them down or what caused it I don't know.

Q. You say Mr. Moulder and some other man filled up the lot? A. Yes, sir.

Q. And they tore the fence down when they graded it? A. Yes, sir.

Q. Did they ask your authority before they tore the fence down? A. No, sir.

WILLIAM MYERS,
By A. JOHNS,
Examiner in Chancery (by Consent).

84 EXHIBIT "A."

Filed January 7, 1896.

In the Supreme Court of the District of Columbia.

CLARK
vs.
OSBORN. } Equity. No. 15141.

It is hereby stipulated and agreed by and between Leo Simmons, solicitor for the complainant and the defendant Walker, and D. S. Mackall, solicitor for the defendant John E. Roller, respectively, that the copies of the original bill, the demurrer of the defendant John E. Roller thereto, the decree sustaining said demurrer, and the order for discontinuance of H. E. Davis, solicitor for complainant, hereto attached and embraced in Defendant Roller's Exhibit No. —, are true copies of the original papers on file in the cause of Allen C. Clark *et al. vs.* Hoagland *et al.*, 14,468, equity, and that the same may be received in evidence with the same force and effect as the originals or certified copies thereof, the complainant reserving the right to oppose the admissibility of such papers as evidence on the ground that they are irrelevant, immaterial, and incompetent.

LEO SIMMONS.
D. S. MACKALL.

(*Copy of Order of Dismissal by H. E. Davis, from Order Book No.* 13, *page* 241.)

"A. C. CLARK
vs.
LYDIA HOAGLAND ET AL. } 14468, Docket 34. Equity.

The clerk will please enter this cause dismissed (15141 being a substitute for it).

H. E. DAVIS,
Sol'r for Compl't."

Filed June 17, 1893. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

CLARK ET AL.
vs.
HOAGLAND, ROLLER, ET AL. } In Equity. No. 14468.

This cause came on to be heard upon the demurrer interposed by the defendant Roller, and the same was argued by the counsel of the respective parties and considered by the court.

It is thereupon, this 17th day of June, 1893, by this court and the authority thereof, adjudged, ordered, and decreed that the said demurrer be, and the same is hereby, sustained, and the said bill be, and the same is hereby, dismissed as to the defendant Roller with costs.

A. B. HAGNER.

True copy.

Test:
J. R. YOUNG, *Clerk, &c.*, [SEAL.]
By R. J. MEIGS, JR., *Ass't Clk.*

85 In the Supreme Court of the District of Columbia.

ALLEN C. CLARK and SARAH P. CLARK, His Wife, Complainants,
vs.
LYDIA HOAGLAND ET AL., Defendants. } Equity. No. 14468, Docket No. —.

The Demurrer of John E. Roller to the Bill of Complaint against Him and Others.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the bill to be true, doth demur thereto, and for cause of demurrer showeth:

First. That the complainants in this cause ought not to be permitted to maintain their bill of complaint as against this defendant, upon the statements made therein, until they shall have first asserted title to the undivided interest in the real estate in said bill mentioned and described, claimed by them, in a court of law.

Second. That the complainants ought not to be permitted to maintain their bill of complaint as against this defendant, upon the statements made therein, because they and those under whom they claim have been guilty of such laches in the assertion of their claim as to preclude them from receiving the aid of a court of equity.

Wherefore, and for divers other errors and imperfections, this defendant humbly demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill or any matters or things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf expended.

JOHN E. ROLLER.

D. S. MACKALL,
Solicitor for Def'ts.

I hereby certify as counsel that, in my opinion, the above demurrer is well founded in law.

D. S. MACKALL.

I, John E. Roller, being first duly sworn, do on my oath depose and say that the above demurrer is not interposed for delay.

JOHN E. ROLLER.

Subscribed and sworn to before me March 7, 1893.

J. R. YOUNG, *Clerk*,
By M. A. CLANCY,
Ass't Clerk.

86 *Copy of Bill.*

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK and SARAH P. CLARK, His Wife, Complainants,
against
LYDIA HOAGLAND, SALLIE OSBURN, ALVERDA Osburn, Grace Osburn, Mason Osburn, Decatur Osburn, Richard Osburn, Herod Osburn, and —— Osburn, Sarah E. Steen and Joseph R. Steen, Her Husband; Elizabeth M. Young, Ruth Hannah Morrow and Jeremiah Morrow, Her Husband; Samuel W. Young; Jane Campbell and James Campbell, Her Husband; Ruth H. Rickey and Matthew C. Rickey, Her Husband; Libbie, or Elizabeth, Smith and A. De Witt Smith, Her Husband; James Ward Scott and Rena R. Scott, His Wife; Coriune L. Scott, James Ward Scott, Jr., Julian Fairfax Scott, Leander Scott, and Flora G. Scott, His Wife; Clara Isabelle Scott, William Lee Scott and Rosa P. Scott, His Wife; Leanna Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, Martha Scott, John H. Walker, Bartow L. Walker and Genevi-ve E. Walker, His Wife; Millard P. McCormick and Lottie B. McCormick, His Wife; Frank Higgins, Trustee; John T. Braddock, Mary V. Marriott and William H. Marriott, Her Husband; Charles L. M. Latimer and Stella E. Latimer, His Wife; Lucy T. Davis and Americus Davis, Her Husband; Ella M. Cox and Samuel Cox, Jr., Her Husband; Mary E. Magruder and John E. Roller, Defendants.

In Equity. No. —.

The complainants state as follows:

1. The complainants are husband and wife, are residents of the District of Columbia, and sue—the complainant Allen C. Clark in his own right and the complainant Sarah P. Clark in her right as his wife.

2. The defendants are residents as follows: The defendant Lydia Hoagland, in the State of New York; the defendants Sallie, Alverda, Grace, Mason, Decatur, and Richard Osburn, in Clark county, State of Virginia; the defendants Herod Osburn and —— Osburn, his

wife, without the District of Columbia, but their residence is otherwise unknown to the complainants; the defendant Sarah E. Steen and Joseph R. Steen, who are husband and wife, in High-
87 land county, State of Ohio; the defendant Elizabeth M. Young, without the District of Columbia, but her residence is otherwise unknown to the complainants; the defendants Ruth Hannah Morrow and Jeremiah Morrow, who are husband and wife, in Clinton county, Ohio; the defendant Samuel W. Young, in Adams county, State of Ohio; the defendants Jane Campbell and James Campbell, who are husband and wife, without the District of Columbia, but their residence is otherwise unknown to the complainants; the defendants Ruth H. Rickey and Matthew C. Rickey, who are husband and wife, in Adams county, State of Ohio; the defendants Libbie, or Elizabeth, Smith and A. De Witt Smith, who are husband and wife, in Sumter county, State of Florida; the defendants James Ward Scott and Rena R. Scott, who are husband and wife; Corrinne L. Scott, James Ward Scott, [illegible], and Julian Fairfax Scott, in the city of Frederick, State of Maryland; the defendants Leander Scott and Flora Scott, who are husband and wife; Clara Isabelle Scott, William Lee Scott and Rosa P. Scott, who are husband and wife; William Lee Scott, Jr., Mary P. Scott, Louisa Scott, and Martha Scott, without the District of Columbia, but their residences are otherwise unknown to the complainants; the defendants John H. Walter, Bartow L. Walker, Genevi-ve E. Walker, who are husband and wife; Millard P. McCormick and Lottie B. McCormick, who are husband and wife; Lucy T. Davis and Americus Davis, who are wife and husband, and Charles M. N. Latimer and Stella E. Latimer, who are husband and wife, in the District of Columbia; the defendant Frank Higgins, in Montgomery county, State of Maryland; the defendants John T. Braddock and Ella M. Cox and Samuel Cox, who are wife and husband, in Charles county, State of Maryland; the defendants Mary V. Marriott and William H. Marriott, who are wife and husband, in Hardin county, State of Kentucky; the defendant Mary E. Magruder, in the State of Maryland, and the defendant John E. Roller, in Rockingham county, State of Virginia.

The following named of the said defendants are infants under the age of twenty-one years, namely, Sallie, Alverda, Grace, Mason, Decatur, and Richard Osburn, Corinne L. Scott, James Ward Scott, Jr., Julian Fairfax, Clara, Isabelle, and Leander Scott, William Lee Scott, Jr., and Mary F., Louisa, and Martha Scott.

The defendants are sued in their own right, except the defendants —— Osburn, the wife of Herod Osburn; Joseph R. Steen, husband of Sarah E. Steen; Jeremiah Morrow, husband of Ruth Hannah Morrow; James Campbell, husband of Jane Campbell; Matthew C. Rickey, husband of Ruth H. Rickey; A. De W..t Smith, husband of Libbie, or Elizabeth, Smith; Rosa P. Scott, wife of William Lee Scott; Rena R. Scott, wife of James Ward Scott; Flora G. Scott, wife of Leander Scott; Genevi-ve E. Walker, wife of Bartow L.

Walker; Lottie B. McCormick, wife of Milliard P. McCormick; William H. Marriott, husband of Mary V. Marriott; Stella E. Latimer, wife of Charles M. N. Latimer; Americus Davis, husband of Lucy T. Davis, and Samuel Cox, Jr., husband of Ella M. Cox, who are sued as the wives and husbands respectively of those de-
83 fendants with whom their names are joined with mention of their respective marital relations.

All of the defendants are sued in respect of their respective interests, hereinafter appearing, in and to the certain lands and premises hereinafter mentioned and described.

3. Abraham Young, late of the District of Columbia, died in or about the year 1800, intestate and seized and possessed of, among others, original lots numbered eight (8), nine (9), and ten (10), in square numbered 1028, in the city of Washington, District of Columbia.

4. The said Abraham Young left surviving him as his only heirs-at-law six children, namely, four sons, John, Samuel Wade, Charles, and Richard Young, and two daughters, namely, Susannah Young, who afterwards intermarried with one John A. Sommers, and Elizabeth Young, who afterwards intermarried with one Mahlon Roach. The wife of the said Abraham Young and the wives and husbands of such of his children as are married are all deceased.

5. Upon and after the death of the said Abraham Young partition was had of all of his real estate situate in the District of Columbia, and in such partition the said lots numbered 8, 9, and 10 aforesaid were allotted to his aforesaid son, John Young.

6. The said John Young, son of the said Abraham Young, afterwards died in the year A. D. 1823, unmarried and intestate, leaving surviving him as his only heirs-at-law the others of the aforesaid children of the aforesaid Abraham Young, brothers and sisters of him, the said John Young.

7. Prior to May 1st, 1826, the said Samuel Wade Young died intestate, and the defendants Sallie, Alverda, Grace, Mason, Decatur, Richard, and Herod Osburn, Ruth Hannah Morrow, Sarah E. Steen, Samuel W. Young, and Ruth H. Rickey, among others, are now heirs-at-law of his, the said Samuel Wade Young. The defendant Jane Campbell is the widow of Charles Young, a deceased son of the said Samuel W. Young, and the interests of the defendants Samuel W. Young and Ruth H. Rickey in the premises are subject to the dower right of the said Jane Campbell in the premises. The defendant Elizabeth M. Young is the widow of Alfred Young, a deceased son of the said Samuel Wade Young, and the interests of the defendant Steen and the interest formerly of the certain Laura B. Rothrock hereinafter mentioned in the premises are subject to the dower right of her, the said Elizabeth M. Young.

8. By conveyances duly executed and recorded in Liber 1530, folio 408, and Liber 1560, folio 80, of the land records of the District of Columbia (the same being hereby referred to as part hereof) there were conveyed and passed to the defendant John H. Walter

and one James W. Denver in trust, as in the said conveyances stated and declared, all of the interests of the heirs-at-law of the said Samuel Wade Young in and to the said lots 8, 9 and 10 aforesaid except the interests of the certain defendants, heirs-at-law of the said Samuel Wade Young and doweresses, as aforesaid, in the 7th para-
89 graph hereof above mentioned, and except the interest of one Laura B. Rothrock, another of the heirs of the said Samuel Wade Young. Afterwards the said James W. Denver died, leaving the said defendant Walter surviving trustee in the premises; and thereafter the said defendant Walter, as such surviving trustee, by deed dated December 23rd, 1892, conveyed to the defendant Lydia Hoagland all of the said interests so as aforesaid conveyed to him and the said Denver, the deed so conveying the same to the said Lydia Hoagland having been on December 27th, 1892, duly recorded in Liber —, folio —, one of the land records aforesaid, and being hereby referred to as part hereof; and the said Laura B. Rothrock, heir-at-law, as aforesaid, of the said Samuel W. Young, by deed dated December 1st, 1888, and duly recorded in Liber 1361, at folio 133, one of the land records aforesaid (the same being hereby referred to as part hereof), conveyed all of her interest in the premises to the complainant Allen C. Clark, who now holds the same.

9. Prior to May 1st, 1826, the said Charles Young, brother of the said John Young aforesaid, died intestate, leaving surviving him as his only heirs-at-law, a son, Solon C. Young, and a daughter, Mary C. Young; and the said Mary C. Young afterwards died unmarried and intestate, leaving as her sole heir-at-law her brother, the said Solon C. Young.

10. Afterwards and on, to wit, October 18th, 1869, the said Solon C. Young, surviving heir-at-law of the said Charles Young and sole heirs-at-law of the said Mary C. Young, as aforesaid, by deed duly executed and recorded in Liber T and R 18, at folio 402, one of the land records aforesaid (the same being hereby referred to as part hereof), conveyed all of the interest and estate formerly of the said Charles Young in the premises to one Alfred G. Haley, his heirs and assigns, in and upon certain trusts in and by the said deed stated and declared, namely, in trust to take possession of, claim, demand, sue for, and recover, or redeem, hold, manage, rent, lease, bargain and sell, and convey or release and quitclaim the same, and of the proceeds thereof one-half to pay and convey unto him, the said Solon C. Young, his heirs or assigns, and the other half to retain to him, the said Haley, his heirs and assigns, a copy of the said deed being hereto annexed, marked "Complainant's Exhibit No. 1," and the same, together with its said record, being hereby referred to as part hereof. The said Haley afterwards died without having executed the said trusts or any of them, and thereafter and on, to wit, Sept. 8, A. D. 1892, one Hardy I. Haley and one Zoe Haley, claiming to be the only heirs-at-law of the said Alfred G. Haley, executed and delivered to the defendant Lydia Hoagland a

deed purporting to convey to her, the said defendant, all of the interest and estate aforesaid, the said deed having been recorded in Liber 1750, at folio 213, one of the land records aforesaid, and being hereby referred to as part hereof; but, as the complainants are advised, and accordingly so aver and charge, the trusts aforesaid having failed by reason of the death of the said Alfred G. Haley without execution thereof, the said last-mentioned deed to the said defendant, Lydia Hoagland, was and is wholly null, void, and of none effect to pass the interest and estate aforesaid and ought to be decreed to be delivered up by the said defendants for cancellation and cancelled.

After the death of the said Alfred G. Haley and before the execution of the said last-mentioned deed, to wit, in the year 1885, the said Solon C. Young died unmarried and intestate, leaving as his only heirs-at-law the descendants and heirs-at-law of the aforesaid Samuel Wade Young, Richard Young, Elizabeth Roach, and Susannah Sommers.

11. The said Elizabeth Roach, in, to wit, the month of August, A. D. 1850, died a widow, leaving surviving her as one of her heirs-at-law the defendant Libbie, or Elizabeth, Smith.

12. By conveyances duly executed and recorded in Liber 1530, folio 408, and Liber 1560, folio 80, of the land records aforesaid (being the same conveyances in the 8th paragraph hereof above mentioned, and the same being hereby referred to as part hereof), there were conveyed and passed to the said defendant, Walter, and the said Denver aforesaid, in trust as aforesaid, all of the interests of the heirs-at-law of the said Elizabeth Roach in the premises, except the interest of the defendant Libbie, or Elizabeth, Smith, an heir-at-law of the said Elizabeth Roach, as aforesaid, and except also the interests of John T. Roach, William J. Roach, and Thomas Gaskill, others of the heirs-at-law of the said Elizabeth Roach. Thereafter, by deed duly executed and recorded, as in the 8th paragraph hereof above stated and mentioned, the said defendant, Walter, as surviving trustee as aforesaid, conveyed to the defendant Lydia Hoagland all of the said interests so as aforesaid conveyed to him and the said Denver, and by deeds duly executed and recorded, respectively, in Liber 1287, at folio 297 *et seq.*, and Liber 1288, at folios 396 and 397, of the land records aforesaid (the same being hereby referred to as part hereof), all the interests of the said John T. Roach, William J. Roach, and Thomas Gaskill and their respective wives in the premises were conveyed to and are now held by the said complainant, Allen C. Clark.

13. The said Susannah Sommers afterwards, to wit, in the month of March, A. D. 1855, died, a widow and intestate, leaving surviving her as one of her heirs-at-law the defendant Mary V. Marriott.

14. By conveyances duly executed and recorded in Liber 1287 at folios 288 *et seq.*, 291 *et seq.*, and 295 *et seq.*, one of the land records aforesaid (the same being hereby referred to as part hereof), all the interest and estate formerly of the said Susannah Sommers aforesaid

in the premises became and now is vested in the said complainant, Allen C. Clark, save and except the interest therein of the defendant Mary V. Marriott, one of the heirs-at-law of the said Susannah Sommers as aforesaid, the said interest of the said defendant, Mary V. Marriott, being a one-twenty-fifth of the interest and estate so as aforesaid formerly of the said Susannah Sommers in the premises, and the same being in the said defendant by reason of the
91 decree of this court in cause No. 11,834, in equity, on its dockets, the record and proceedings in which cause are hereby referred to as part hereof.

15. By conveyances duly executed and recorded, to wit, in the years A. D. 1826, 1838, and 1841, in Libers W. B. 16, folio 359; W. B. 70, folio 355, and W. B. 82, folio 448, of the land records aforesaid (the same being hereby referred to as part hereof), all of the interest and estate formerly of the said Richard Young aforesaid in the premises as heir-at-law of his brother, the said John Young aforesaid—that is to say, a one-fifth interest in the said lots aforesaid—became and was vested in one James Ward Scott, late of the State of Maryland, deceased. The said Scott afterwards died, having, previously, and on, to wit, August 22, A. D. 1868, duly executed his last will and testament so as to pass real estate in the District of Columbia, and the said last will and testament was duly admitted to probate and record in the orphans' court of Baltimore city, State of Maryland, and a certified copy thereof has been filed in the office of the register of wills of the District of Columbia, and the same is hereby referred to as part hereof. In and by the said last will and testament the said James Ward Scott devised all of his real estate to his wife, Leanna Scott, for life, with certain powers, and upon her death to his three sons, William, James, and Leander, for their respective lives, with remainder over to such of their respective issue (excluding the issue of the said Leander by one Addie P. Tyler, claiming to be his wife) as should attain the age of twenty-one years, with an executory devise over the said James Ward Scott's heirs, according to the statute of descents of the State of Maryland. The said last will and testament also contained provision for other contingencies, since become immaterial. The said Leanna Scott, widow of the said James Ward Scott, afterwards died without having executed any of the powers in and by said last will and testament upon her conferred. The said William, James, and Leander Scott, sons of the said James Ward Scott, who are still living with their respective wives, are made parties defendant hereto, have lawful issue living, all under the age of twenty-one years and unmarried, as follows: The defendants Leanna Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, and Martha Scott, children of the said William; Corinne L. Scott, James Ward Scott, Jr., and Julia Fairfax Scott, children of the said James Scott, and Clara Isabelle Scott, daughter of the said Leander Scott, by his lawful wife, Flora Gardner Scott, and the said defendants, William, James, and Leander Scott, are the only heirs-at-law of the said James Ward Scott, accord-

ing to the statute aforesaid, and the said defendants Scott, children of the said William, James, and Leander, would be the only such heirs in case their respective fathers were now dead.

16. If, as the complainants claim, the deed aforesaid of the said Hardy I. Haley and Zoe Haley to the defendant Lydia Hoagland be null, void, and of none effect to pass the interest and estate formerly of the aforesaid Charles Young, brother of the said
92 John Young, in the premises, then upon the death of the Solon C. Young, sole surviving heir-at-law of the said Charles Young, all of the said interest and estate passed to the heirs-at-law of the said Solon C. Young, being, as aforesaid, the descendants and heirs-at-law of the aforesaid Samuel Wade Young, Richard Young, Susannah Sommers, and Elizabeth Roach, brothers and sisters of the said John Young as aforesaid. By virtue of the said conveyances hereinbefore mentioned, all of which were executed after the death of the said Solon C. Young and before the execution of the said deed to the said defendant, Hoagland, all of the said interest and estate has passed out of the said heirs-at-law of the said Solon C. Young, except the interests therein of such of the said heirs-at-law as are made defendants hereto. In addition to the said interests, as hereinbefore appearing, the defendants in this paragraph hereinafter named hold certain interests in the said interest and estate formerly of the said Charles Young, which interests have been derived to the said defendants through the heirs-at-law of Richard Young, brother of the said Charles, namely, the defendant Frank Higgins, trustee; John T. Braddock, Millard P. McCormick and Lottie D. McCormick, his wife; John H. Walter, Charles M. N. Latimer and Stella C. Latimer, his wife; Lucy T. Davis and Americus Davis, her husband; Ella M. Cox and Samuel Cox, Jr., her husband; Mary E. Magruder, and Bartow L. Walker and Genevi-ve E. Walker, his wife.

17. By virtue of certain deeds recorded respectively in Liber J. A. S. 35, folio 224; Liber 788, folio 240; Liber 1147, folio 289; Liber 1374, folio 394; Liber 1374, folio 395, and Liber 1374, folio 397, of the land records aforesaid, the defendant John E. Roller claims to have title to or an interest in the said lots numbered 8, 9, and 10 aforesaid. The said supposed title or interest so claimed by him, the said defendant, is a tax title, so called, purporting to depend upon and arise out of a pretended sale of the said lots by the late corporation of Washington prior to the year A. D. 1852, to wit, in the year A. D. 1850. The said pretended sale and the proceedings in relation thereto were and are irregular, illegal, and wholly null and void in that the requirements of law in that behalf were not complied with but were disregarded, and especially in that the officer of officers of the said corporation purporting to sell the said lots for taxes did not, within ten days after the supposed sale thereof or at any time, transmit to the clerk of the late circuit court of the District of Columbia for the county of Washington an accurate report or any report in writing certified by the clerk or register of the said corporation in manner and form as required by section 2 of the act

of the Congress of the United States approved February 20, 1819, and entitled "An act supplemental to the act entitled, An act further to amend the charter of the city of Washington," nor was such report or any report in the premises forthwith, or at any time recorded by the said clerk or any one else among the land records of the said county; nevertheless the said defendant, Roller, by virtue of said pretended tax sale, claims title or interest as aforesaid in the said lot, and the true title thereto is clouded by reason of the
93 said claim of the said defendant and the said deeds aforesaid, and the complainants are advised that they are entitled to have the said pretended sale decreed to be null, void, and of none effect and the said deeds and each of them to be similarly decreed to be null, void, and of none effect and delivered up for cancellation and cancelled, and to that end, and to the end that the cloud upon the title to the said lots may be removed and the full value thereof realized at the sales hereinafter prayed, the said defendant, Roller, is made party, hereto.

18. By reason of the minority of certain of the defendants, as aforesaid, the provisions of the will of the said James Ward Scott, as aforesaid, the numerous and in some instances very small interests therein *the* outstanding upon the record of the said deed from the said Haleys to the defendant Lydia Hoagland and the supposed tax title in the said defendant, Roller, and the impossibility of any agreement among the parties interested in the premises, no division of the lands and premises aforesaid among the parties entitled thereto, according to their respective rights and interests, can be made without loss or injury to the said parties, and, in order to a partition among the said parties of the said lands and premises, a sale thereof is necessary and a division of the money arising from such sale among the said parties according to their respective rights and interests.

The premises considered, the complainants therefore pray:

First. That process may duly issue out of this court to the defendants and each of them, commanding them to appear to and answer the exigency of this bill.

Secondly. That the certain deed of the said Hardy I. Haley and Zoe Haley to the defendant Lydia Hoagland, above described, may be adjudged to be null, void, and of none effect and decreed to be delivered up by the said defendant, Lydia Hoagland, and cancelled.

Third. That the suppose- tax title of the said defendant, John E. Roller, may be decreed to be null and void, and that the conveyances in relation thereto and in connection therewith may be decreed to be delivered up for cancellation and cancelled.

Fourthly. That a sale may be decreed and had of the said lots numbered 8, 9, and 10, in square numbered 1028, in the city of Washington, District of Columbia, aforesaid, and the money arising from such sale divided among the parties according to their respective rights and interests.

Fifthly. That all necessary orders may be made and proceedings

had in the premises as are necessary to the relief hereby prayed; and

Sixthly. That the complainants may have such other and further relief in the premises as the nature of their case may require.

The defendants to this bill of complaint are as follows: Lydia Hoagland, Sallie Osburn, Alverda Osburn, Grace Osburn, Mason Osburn, Decatur Osburn, Richard Osburn, Herod Osburn, and —— Osburn, Sarah F. Steen and Joseph R. Steen, her husband; Elizabeth M. Young, Ruth Hannah Morrow and Jeremiah Morrow, her husband; Samuel W. Young, Jane Campbell and James Campbell her husband; Ruth H. Rickey and Matthew C. Rickey her husband; Libbie, or Elizabeth Smith and A. De Witt Smith, her husband; James Ward Scott and Rene R. Scott, his wife; Corinne L. Scott, James Ward Scott, Jr. Julian Fairfax Scott, Leander Scott and Flora G. Scott his wife; Clara Isabelle Scott, William Lee
94 Scott and Rosa P. Scott, his wife; Leanna Scott, William Lee Scott, Jr., Mary P. Scott, Louisa Scott, Martha Scott, John H. Walter, Bartow L. Walker and Genevi-ve E. Walker his wife; Millard P. McCormick and Lottie B. McCormick his wife; Frank Higgins, trustee; John T. Braddock, Mary V. Marriott and William H. Marriott her husband Charles L. M. Latimer and Stella E. Latimer his wife; Lucy T. Davis and Americus Davis her husband; Ella M. Cox and Samuel Cox, Jr., her husband; Mary E. Magruder and John E. Roller.

ALLEN C. CLARK.
SARAH P. CLARK.

HENRY E. DAVIS,
Solicitor for Complainants.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me a notary public in and for the District aforesaid, Allen C. Clark and Sarah P. Clark, his wife, who being by me first duly severally sworn, do depose and say that they have heard read the foregoing bill of complaint by them subscribed and know the contents thereof, and that the facts therein stated of their own knowledge are true and those stated on their information and belief they believe to be true.

ALLEN C. CLARK.
SARAH P. CLARK.

Subscribed and sworn to before me this 14th day of January, A. D. 1893.

[SEAL.] APPLETON P. CLARK,
Notary Public.

95 *Decree Dismissing Bill as to Roller.*

Filed May 5, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX.
vs.
JANE CAMPBELL OSBURN ET AL. } No. 15141. Equity. Docket 36.

This cause coming on for final hearing on the pleadings and evidence and having been heard and considered, and the court being of opinion that it has no jurisdiction to entertain this suit, as against the defendant John E. Roller, that the bill of complaint is multifarious as regards said defendant, and that the complainants are barred by their own laches from any equitable relief against said defendant, it is hereby, this 5th day of May, 1896, ordered, adjudged, and decreed that the bill of complaint be dismissed as against said defendant Roller; but it further appearing that said Roller was admitted as a defendant in this cause upon his own application and without the consent of the complainants, it is further decreed that said dismissal be without costs to said defendant.

This cause is reserved for further proceedings as between the other parties to the cause.

W. S. COX, *J.*

Decree for Partition, &c.

Filed May 6, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX.
vs.
SALLIE OSBORN ET AL. } Equity. No. 15141.

This cause coming on to be heard and having been argued by counsel for the several parties and the proceedings read and considered by the court, it is therefore this 6th day of May, 1896, by the court adjudged, ordered, and decreed that there be a partition of the real estate described in said proceeding, of which John Young died seized, to wit, original lots eight (*6*), nine (9), and ten (10), square numbered one thousand and twenty-eight (1028), amongst the parties to this cause (save and excepting the intervenor John E. Roller) according to their respective interests as heirs, grantees, and assignees of the heirs of said John Young, to hold in

severalty in fee-simple; and to the end that this court may be enabled to make such partition it is further adjudged, ordered, and decreed that a commission in the usual form issue to (Victor Anderson, John A. Butler, Fred A. Aukam, George Henderson, and
96 Charles P. Stone), of the city of Washington, District of Columbia, authorizing them or any four or three of them to enter upon, walk over, and survey the said real estate and value the same subject to all incumbrances, if any thereon, and to divide the same into sixty-three hundred parts, having regard to quantity and quality, if in their opinion the said real estate be susceptible of such division, with advantage to all the parties interested therein, and to allot sixteen hundred and twenty parts, or 1620 / 6300 of the whole, subject to the dower of Elizabeth M. Young, widow of Alfred Young, in 90 / 6300 of same, to the complainant Allen C. Clark, to hold in severalty, and to the defendant Bartow L. Walker, for the use of the Virginia Alabama Company, a corporation, 2999 parts, 2999 / 6300 of the whole, to hold in severalty; to defendant Sarah E. Steen 90 parts, or 90 / 6300 of the whole, subject to the dower interest of Elizabeth Young, widow of Alfred Young, in said 90 / 6300, to hold in severalty; to defendant Ruth H. Rickey 90 parts, or 90 / 6300 of the whole, subject to the dower interest of Jane Campbell, widow of Charles Young, in said 90 / 6300, to hold in severalty; to defendant Samuel W. Young 90 parts, or 90 / 6300 of the whole, subject to the dower interest of said Jane Cam-bell, widow as aforesaid, in said 90 / 633, to hold in severalty; to the defendant Ruth Morrow sixty parts, or 60 / 6300 of the whole, to hold in severalty; to defendant Herod Osborn 30 parts, or 30 / 6300 of the whole, to hold in severalty; to Libbie Smith 36 parts, or 36 / 6300 of the whole, to hold in severalty; to defendant Alverda Osborn 5 parts, or 5 / 6300 of the whole, to hold in severalty; to defendant Grace Osborn 5 parts, or 5 / 6300 of the whole, to hold in severalty; to the defendant Mason Osborn 5 parts, or 5 / 6300 of the whole, to hold in severalty; to defendant Decatur Osborn 5 parts, or 5 / 6300 of the whole, to hold in severalty; to defendant Richard Osborn 5 parts, or 5 / 6300 of the whole, to hold in severalty; to the defendants, the heirs and devisees of James Ward Scott, 1260 parts, or 1260 / 6300 of the whole, to hold as directed by the will of said James Ward Scott, but in severalty as to all other parties to this cause, and if, in their opinion, the said real estate be not susceptible of such division, with advantage to all the parties interested therein, then that they proceed to divide the same into such lesser number of parts as they may deem most to the advantage of all parties interested therein, and ascertain the value of each part thereof, subject to any incumbrances thereon, having regard as aforesaid to quantity and quality; and if, in their opinion, the said real estate will not admit of division without loss or injury to the parties, then that they make return of their said judgment, and the reasons upon which the same was formed, with the real value of the said estate, subject to any incumbrance thereon, and that the said commissioners make out or cause to be made a plat

and certificate of the said real estate and of the division thereof, with the beginning and courses, and an accurate description of the said estate and of the several parts thereof. It appearing to the court that the interests of said defendants, the heirs and devisees of said James Ward Scott, cannot be decreed to be sold for the purpose of partition for reasons of certain provisions in the will of said Scott, it is therefore further adjudged, ordered, and decreed that, whether said real estate other than that owned by said Scott can be divided or not without loss and injury to the parties, the interest of said Scott's heirs, which is shown to be a one-fifth part, shall be allotted and set off to them as hereinbefore directed, and to said commission there shall be annexed the usual oath of office.

W. S. COX, *J.*

97 *Notice of Appeal, &c.*

Filed May 21, 1896.

In the Supreme Court of the District of Columbia.

CLARK ET AL. vs. OSBORN ET AL. } Equity. No. 15141.

The clerk of said court will please enter an appeal from the decrees of the court in this case, to the Court of Appeals, and issue citations to the complainants.

D. S. MACKALL,
Attorney for John E. Roller.

98 Supreme Court of the District of Columbia.

WEDNESDAY, *May* 20, 1896.

Court meets pursuant to adjournment.

* * * * * * *

CLARK ET AL. vs. OSBORN ET AL. } 15140, Equity Docket 36.

It is, this 20th day of May, 1896, ordered that the defendant John E. Roller have and hereby is granted leave to deposit in the clerk's office the sum of $100 to cover the costs of his appeal in the above entitled cause, in lieu of a bond for such amount.

W. S. COX, *J.*

89 *Return of Commissioners, &c.*

Filed May 29, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX. vs. SALLIE OSBORN ET AL. } Equity. No. 15141.

To the supreme court of the District of Columbia, holding an equity court:

The undersigned commissioners appointed by decree of this court to make partition of the real estate mentioned and described in this cause respectfully report to the court as follows:

After taking the oath of office and giving notice to the parties, as required by the decree, they did meet at the office of Leo Simmons Esq., No. 600 F. street, N. W., and did go from there, walk over and view said real estate, to wit: original lots 8, 9 & 10 in square 1028, and did cause a plat of said land to be made by Charles P. Calvert Esq., civil engineer, and assistant to the surveyor for the District of Columbia, whereby it is proposed to divide said land into nineteen parts, the same being numbered and described as parcels A. B. C. D. E. F. G. H. I. K. L. M. N. O. P. Q. R. S. T. and being described by metes and bounds with the true courses and distances, with the exact area as set forth and described, according to the plat aforesaid herewith filed. That we have placed a money value upon said real estate, as follows—that is to say:

100

Parcel A, containing	2404.96 feet at	38 cents sq. ft.....		$913.88
Parcel B, containing	2314.19 feet at	39 cents sq. ft.....		902.53
" C, containing	2224.83 feet at	40 cents sq. ft.....		889.93
" D, "	2127.33 feet at	41 " " "		872.20
" E, "	1715 " "	51 " " "		874.65
" F, "	1085 " "	65 " " "		705.25
" G, "	1085 " "	65 " " "		705.25
" H, "	1085 " "	65 " " "		705.25
" I, "	1085 " "	65 " " "		705.25
" K, "	1085 " "	65 " " "		705.25
" L, "	1178 " "	1.25 " " "		1472.50
" M, "	1917 " "	45 " " "		862.65
" N, "	1917 " "	45 " " "		862.65
" O, "	2232 " "	40 " " "		892.80
" P, "	2410.46 " "	1.25 " " "		3013.07
" Q, "	1700.68 " "	1.00 " " "		1700.68
" R, "	1910.08 " "	95 " " "		1814.57
" S, "	2119.48 " "	90 " " "		1907.53
" T, "	672.42 " "	90 " " "		605.18
Total sq. feet,	32,268.43			
Amounting to a total sum in value of.....				$21111.07

We find that it is impracticable to divide said real estate among the parties to this cause in the proportions to which they appear to be entitled, for the reason that should it be done, the interest owned by some of the parties being so small, the part they would be entitled to would have a street frontage of less than five feet, which would destroy the value of same.

We therefore as directed by the decree, set off one-fifth in
101 value, of said land to the defendants the heirs and devisees of James W. Scott, which will not in any way impair the value of the interest of said Scott heirs or the other parties to said cause.

We are advised, and so find to be a fact, that the heirs and devisees of said James Ward Scott are the owners of the west fourteen feet of lot 11 in said square 1028, which is immediately contiguous to lot 10 in said square, a part of the property mentioned herein.

We therefore set off and allot to said heirs, to hold as directed by said decree but in severalty as to all the parties to this suit, part of lot ten (10) of said square, the same being parcel T. of said plat and survey, which is made part of this report, which parcel T. has a frontage on Maryland avenue of 6 feet, thus making a frontage of 20 feet, including the parcel now owned of lot 11.

Said parcel T. contains 672.42 square feet at 90 cents per foot amounting to..... $605.18

We also allot to said Scott's heirs

Parcel	A,	containing	2404.96	feet	at	38	cents	sq. ft.....	913.88
"	B,	"	2314.19	"	"	39	"	" ".....	902.53
"	C,	"	2224.83	"	"	40	"	" ".....	889.93
"	D,	"	2127.33	"	"	41	"	" ".....	872.20

Total amount in value, due Scott heirs..... $4222.10
Amount allowed..... 4183.72

Leaving a balance of $38.38 due to them to be charged against the remaining part of said land and to be dealt with under the directions of the court.

And the remaining part or parcels of said land, your commissioners recommend, that same be sold for the purpose of partition among the other parties entitled, for the reason hereinbefore set forth.

We further report that we have held four sessions, and re-
102 spectfully ask to be allowed such pay for same, as the court may deem just and proper.

We further report that Charles P. Stone, one of the commissioners appointed with us, after taking the oath of office, declined to act.

VICTOR ANDERSON.
JOHN A. BUTLER.
FREDERICK G. AUKAM.
GEORGE HENDERSON.

Witness:
LEO SIMMONS.
CHAS. F. MORTIMER.

May 28, 1896.

103 Filed May 29, 1896. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX. vs. SALLIE OSBORN ET AL. } No. 15141, Equity Docket.

The President of the United States to Victor Anderson, John A. Butler, Fred. G. Aukam, George Henderson, and Charles P. Stone:

You have been appointed, by said court, to adjudge and determine whether said estate will admit of being divided between said parties without injury and loss to all of them; and if, in your opinion and judgment, said estate can be so divided, then *to divide and make partition of the same fairly and equally in value, between all the parties interested, according to their several just proportions;* and if you, or a majority of you, determine that said estate can not be divided without loss to all the parties, then, *to make return to the court, of your said judgment, and the reasons upon which the same is founded, and the real value of the estate in current money.*

And, therefore, you are hereby authorized and commanded to meet together at certain proper and convenient times and places, by you to be appointed, of which meeting or meetings you are to give reasonable notice to all parties concerned, before any proceeding be had, and having taken and subscribed the oath hereto annexed, you are to go from the place of your meeting to, and enter upon, and walk over, the estate in question; and if the estate to be divided consist of lands, and you, or a majority of you, determine that said lands can be divided without loss and injury to all of the parties, then *you shall cause the same to be surveyed and laid out by the county surveyor, or such other person as you may think qualified, for the several parties, and allot them, respectively, their several shares of said lands;* and if the estate consist of more tracts of land than one, then you shall make the division so as not to split the several tracts, if it can be done consistently with equality; and if it can not be exactly done

in that mode, then *you shall add so much of the larger or more valuable tracts to the less valuable as will make the portions equal in value.* And if the estate to be divided consist of houses, *you shall make allotment and partition thereof as aforesaid between the parties.* And after having made allotment or partition in manner aforesaid, *you are to return your proceedings to the said court at its next term to happen thereafter.* And if you, or a majority of you, determine that the estate can not be divided without loss to all the parties, then *you are to make return to said court, at said term, of your said judgment, and the reasons upon which the same is formed, and the real value of the estate in current money.* And in ascertaining the value of the estate, whether you decide that it can or can not be divided, *you are to take into consideration any incumbrances on the land.* If the estate be incumbered with a dower interest, you are to ascertain the same, and distinguish by metes and bounds distinctly set forth; and if the estate can not be divided, and so returned, and the widow consents that the whole estate may be sold, you are to state the fact in your certificate hereinafter mentioned.

And for the better making of such division, and to facilitate the performance of your duty in the premises, you are empowered to cause all such witnesses as you shall see occasion for, to come before you, and examine each of them apart, upon his or her oath or affirmation, first taken before you, upon such interrogatories, in writing, as you shall see occasion for, to discover and make out the truth of the premises, and to take the depositions of such witnesses in writing, plainly and fairly set forth, each deposition to be signed by the witness who makes it. And when you have done all these things, certify and return into said supreme court, without delay, the facts and proceedings in the premises by your certificate, fairly written, together with such examinations and interrogatories, and also this writ, closed up under your seals, or the seals of a majority of you.

Witness, the Honorable Edward F. Bingham, chief justice of said court the 6th day of May, A. D. 1896.

[SEAL.] JOHN R. YOUNG, *Clerk*,
By R. J. MEIGS, JR.,
Assistant Clerk.

Commissioners' Oath.

We swear, well and truly, and without favor, partiality, or prejudice, to adjudge and determine whether the estate within mentioned will admit of being divided without injury to all the parties entitled; and that, if we so decide, we will then divide and make partition of the same fairly and equally in value between all the parties interested, according to their several just proportions; and if we determine that the estate can not be so divided, then we will make return

13th Street, East
90
88
62
18
18
18
62
1170
1085
1085
1085
1085
9
M
N
O
P
Q
R
S
T
10.75
20
20
20
6
53.62
124.10.4c
79.00
17.00.69
90.67
22.575
124
80.016
100.74
21.19.48
106.50
126
102.50
Maryland
Ave

Square 1028

(Copy)

Maryland Avenue

13th Street, East

P

Q

R

S

T

O

Z

M

N

9

8

94.75

20

20

6

18.75

62

80

2410.46

72.00

1700.00

1306.63

910.00

100.74

2119.48

111.21

109.93

572.42

53.62

22.575

22.575

22.575

124

2232

18

102.50

126

1917

1917

102.50

1715

90

62

1170

1085

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1085

1085

1085

62

90

20

120

14.57

18.77

18.77

18.77

2127.33

124.559

2224.83

129.707

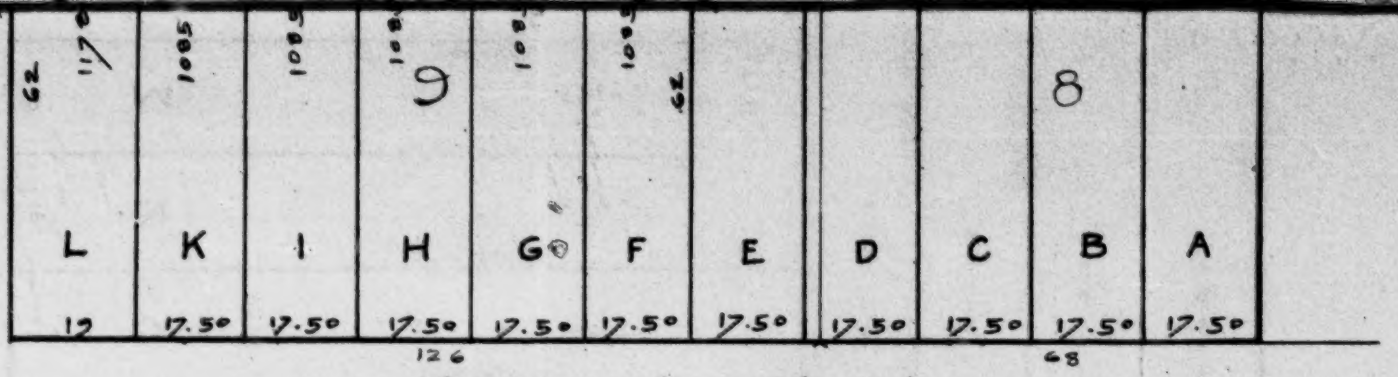
2314.19

134.853

2404.96

140

140



I hereby certify that the distances and areas of the above subdivision (in black lines and figures) of original lots 8, 9 and 10, Square 1028, are correct

(Signed) Charles P. Colrert
C.E.

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Washington Heights

2 Sheets 1058

to the court of the reasons upon which our said judgment is formed, and of the real value of the estate in current money.

VICTOR ANDERSON.
JNO. A. BUTLER.
FREDERICK G. AUKAM.
GEORGE HENDERSON.
CHAS. P. STONE.

Subscribed and sworn to before me this 15th day of May, 1896.

[SEAL.] HERBERT M. LOCKE,
Notary Public, D. C.

[Endorsed:] No. 15141, equity docket. Clark, Allen C., *et al.*, vs. Osborn, Sallie, *et al.* Commission of partition. Issued May 6, 1896. Returned —— —, 1896.

(Here follows diagram marked p. 104.)

105 *Decree Confirming Commissioners' Report.*

Filed June 30, 1896.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX.
vs.
SALLIE OSBORN ET AL. } Equity. No. 15141.

The commissioners having made their return in this cause, and the same having been ratified *nisi*, and no objection having been made to the partition of the land involved in this cause as reported by said commission, it is therefore this 30th day of June, 1896, adjudged, ordered and decreed that said report be and the same is hereby ratified and confirmed; and it is further adjudged ordered and decreed that all the parties to this cause, other than the heirs and devisees of James Ward Scott, within ten days from this date, by good and sufficient deed, convey to said heirs of said James Ward Scott, the land set off and allotted to them, by said commissioners; to wit; all of original lot number eight (8) and the east two (2) feet of original lot number nine (9) by the full depth thereof and the east six feet of original lot number ten (10) by the full depth thereof, in square number one thousand twenty eight (1028) as set forth and described by the plat and survey made by said commissioners filed in this cause, and if said parties do not convey the premises aforesaid within said time then this decree to stand as a conveyance thereof.

And it is further adjudged, ordered and decreed that the remainder of said property, to wit: all of original lot number nine (9) except the east two (2) feet front by full depth thereof, and all of
106 original lot ten (10) except the east six (6) feet front by full depth thereof, in said square number one thousand twenty eight (1028) be sold for the purpose of partition between the parties to this cause other than the defendant John E. Roller, and the defendants the heirs and devisees of said James Ward Scott, and that Leo Simmons, Esq., be and is hereby appointed trustee to make such sale of the real estate aforesaid; and that the course and manner of his proceeding shall be as follows: He shall first file in the clerk's office of this court, a bond to the United States, executed by himself, with a surety or sureties to be approved by the court, in the penalty of fifteen thousand dollars, conditioned for the faithful performance of the trust in him reposed by this decree, or which may be reposed in him by any further decree or order in the premises.

He shall then proceed to make sale of the said premises either as a whole or separately and either at public or private sale, if at public sale, having first given at least ten days' previous notice, inserted in

some newspaper printed in the city of Washington, and such other notice, as he may think proper, of the time, place, manner, and terms of sale; which terms shall be as follows: One third of the purchase money in cash, and the balance in one and two years from the date of sale, deferred payments to be evidenced by the notes of the purchaser, bearing interest at the rate of six per cent. per annum, secured by deed of trust on the premises sold, or all cash at the purchaser's option.

And as soon as may be convenient after any such sale or sales the said trustee shall return to this court a full and particular account of the same, with an affidavit of the truth thereof, and of the fairness of such sale or sales, annexed. And on the ratification of
107 such sale or sales by the court, and on the payment of the purchase money or compliance with the terms of the sale or sales, the said trustee, by a good and sufficient deed, to be executed and acknowledged agreeably to law, shall convey to the purchaser or purchasers of said property, and to his, her or their heirs the property to him, her or them sold, free, clear and discharged of all claim of the parties to this cause, and of any person or persons claiming by, from or under them. And the said trustee shall bring into this court the money arising on such sale or sales, and the notes which may be taken for the same, to be disposed of under the direction of this court, after deducting therefrom the costs of this suit, and such commission to the trustee as the court shall think proper to allow on consideration of the skill, attention and fidelity wherewith he shall appear to have discharged his trust.

By the court:

W. S. COX, *J.*

108 Supreme Court of the District of Columbia.

MONDAY, *October* 24, 1898.

Court meets pursuant to adjournment.

* * * * * * *

ALLEN C. CLARK
vs.
HEROD OSBORN ET AL. } 15141, Equity Docket 36.

On motion of the complainant, it is, this 24th. day of October 1898, ordered that the appeal of John E. Roller, the intervener in this cause be and the same is hereby dismissed, for failure to file a bond for cost, as required by the rules of this court.

W. S. COX, *J.*

109 *Petition of John E. Roller.*

Filed July 26, 1901.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

ALLEN C. CLARK ET AL., Complainants,
vs.
SALLIE OSBURN ET AL., Defendants.
} In Equity. No. 15141.

The petition of John E. Roller respectfully represents unto this honorable court as follows:

1. Your petitioner is a citizen of the United States and a resident of the city of Harrisonburg, State of Virginia.

2. Your petitioner is the sole and exclusive owner in fee-simple of original lots Nos. 8, 9, and 10, in square No. 1028, in the city of Washington, in the District of Columbia, and is now in the sole and exclusive possession of said property; that your petitioner acquired said property for value and without notice of any claims thereto on the part of any other person whatsoever heretofore, to wit, in or about the year 1886, and has ever since exercised all the rights of ownership with respect to said property and has paid all taxes and assessments against said property, the same being assessed in the name of your petitioner.

3. That heretofore, to wit, on the — day of ——, Allen C. Clark, claiming an alleged interest in said property as alienee of some of the heirs-at-law of John Young, instituted a suit in this honorable court against the other heirs, devisees, and alienees of the alleged title of the said John Young, and also against your petitioner, wherein and whereby he sought to have the title of your petitioner declared null and void; that said cause came on for hearing, and on the 17th day of June, 1893, a decree was passed in said cause dismissing said bill of complaint and denying any relief against your petitioner, on the ground of laches, &c., a copy of said decree being herewith filed, marked "Exhibit No. 1," and your petitioner hereby refers to the records and proceedings in said cause and prays that the same may be taken and considered as a part of this petition.

4. That thereafter, to wit, on November 24, 1893, complainant Allen C. Clark and others instituted this suit for the purpose of obtaining partition of the alleged title of the said John Young, which it was averred was vested in the parties to this cause; that your petitioner became a party defendant to this cause for the purpose of protecting his rights in and to said property, and thereafter the complainants filed a supplemental bill in this cause wherein they again sought to have your petitioner's title declared null and void;

that said cause came on for hearing and on May 5th 1896, a decree was passed in this cause denying the complainants any relief against your petitioner and dismissing this suit as to your petitioner, but reserving this cause for further proceeding as between the other parties to this cause, all of which will more fully appear by reference to a copy of said decree, which is hereto annexed, marked "Exhibit No. 2," and prayed to be taken and considered as a part of this petition.

5. That your petitioner, having twice appeared in this honorable court and successfully resisted the attacks made upon his ownership of the property aforesaid, assumed that the matter had been finally adjudicated and determined by this honorable court, and that no further attempt would or could be made which would in any way tend to molest, interfere with, or cloud the ownership of your petitioner; that your petitioner is informed and believes that after your petitioner had been dismissed from said suit as aforesaid and after this honorable court had distinctly stated by its decree that the representatives of the alleged Young title could have no relief as against your petitioner the remaining parties to said cause obtained a decree for the pe-tition of the alleged title of the said Young heirs, and thereafter, to wit, on June 30, 1896, obtained a further decree for the sale of a portion of said alleged title; that your petitioner was in no way a party to said subsequent proceedings and had no notice or knowledge thereof until after the same had been entered among the files of said suit; that your petitioner has all along rested upon the decrees of this honorable court made in the two instances referred to in his favor and felt assured that no attempt would ever be made to sell the alleged title of the Young heirs; that since the date of said decree of sale on June 30, 1896, the trustees therein named, as your petitioner is informed and believes, has taken absolutely no steps whatever to sell said property and has only recently advertised said property for sale under said decree, a copy of said advertisement being herewith filed, marked "Exhibit No. 3."

6. Your petitioner charges and avers (and appeals to the said adjudication of this honorable court referred to herein in support of his position) that said proceedings in this cause subsequent to the decree of May 5th, 1896, and the decree of sale obtained thereon was taken and made with respect to at most a mere paper title, and at a time when your complainant was in the sole and exclusive possession of all of said property and claiming to be the sole and exclusive owner thereof, both in law and equity, and your petitioner is advised and believes that said subsequent proceedings in said cause are null and void and that the court was without jurisdiction and authority to pass the said subsequent orders and decrees in this cause, and that while said subsequent decrees are in no way binding upon your petitioner they nevertheless tend to throw a cloud upon the title and ownership of your petitioner, and to embarrass him in the full use and enjoyment of his said properties, and that a sale under said decree, being a decree of this honorable court, might

still further tend to injure this petitioner, provoke litigation, and possibly mislead an innocent purchaser.

111 Your petitioner is advised and believes that this honorable court will not permit a sale of said property under the circumstances, and will not, in view of the adjudications of this court, in any way aid or assist the alleged representatives of the John Young title in their attempt to molest and deprive petitioner of the full use and enjoyment of said property, which he acquired in good faith as aforesaid.

And your petitioner, being without remedy save through the intervention of this honorable court, prays as follows:

1. That your petitioner may have leave to intervene in this cause for the purpose of protecting his interest, right, and title in and to the subject-matter of this suit.

2. That he may have the writ of subpœna of this court directed to the parties to this cause, commanding them to appear and answer this petition.

3. That the sale advertised by the trustee in this cause may be stayed or enjoined temporarily until a hearing can be had on this petition, and upon a hearing that the same may be stayed or enjoined until a final hearing upon the merits may be had on this petition.

3½. That he may have leave to introduce such testimony as may appear to him necessary and proper in the premises.

4. That a decree may be passed in this cause annulling and vacating all proceedings in this cause subsequent to the decree of May 5th, 1896, and dismissing this cause finally.

5. That petitioner may have such other and further relief as may appear right and proper, the premises considered.

JOHN E. ROLLER,
By Counsel.

MACKALL & MAEDEL,
Sol'rs for Petitioner.

Endorsed.

Leave to file this petition is granted.

A. C. BRADLEY, *Justice.*

EXHIBIT No. 1.

In the Supreme Court of the District of Columbia.

CLARK ET AL.
vs.
HAOGLAND ROLLER. } In Equity. No. 14468.

This cause came on to be heard upon the demurrer interposed by the defendant Roller, and the same was argued by counsel for the respective parties and considered by the court.

It is therefore, this 17th day of June, 1893, by this court and the authority thereof authorized, ordered, and decreed that the said demurrer be, and the same is hereby, sustained, and the said bill be, and the same is hereby, dismissed as to the defendant Roller, with costs.

(Signed) A. B. HAGNER.

112 EXHIBIT No. 2.

Filed May 5, 1896. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX.
vs.
JANE CAMPBELL OSBORN ET AL. } No. 15141, Equity Doc. 36.

This cause coming on for final hearing on the pleadings and evidence, and having been heard and considered, and the court being of opinion that it has no jurisdiction to entertain this suit as against the defendant John E. Roller; that the bill of complaint is multifarious as regards said defendant, and that the complainants are barred by their own laches from any equitable relief against said defendant, it is hereby, this 5th day of May, 1896, ordered, adjudged, and decreed that the bill of complaint be dismissed as against said defendant, Roller; but it further appearing that said Roller was admitted as a defendant in this cause upon his own application and without the consent of the complainants, it is further decreed that said dismissal be without costs to said defendant. This cause is reserved for further proceedings between the other parties to the cause.

W. S. COX, *J.*

EXHIBIT No. 3.

James W. Ratcliffe, auctioneer.

Trustee's Sale of Valuable Building Lots at Corner of Maryland Avenue and 13th St. N. E., City.

By virtue of a decree, passed in equity cause No. 15141, of the supreme court of the District of Columbia, I will sell at public auction, on the twenty-third day of July, 1901, at half past four o'clock p. m., in front of the premises, all those certain pieces or parcels of land and premises situate in the city of Washington, District of Columbia, and being part of original lots nine (9) and ten (10) in square one thousand and twenty-eight (1028), being described as follows: Beginning at the southwest corner of said lot nine (9) and running thence north along Thirteenth street one hundred and

seventy-eight feet (178) to the northwest corner of said lot ten (10); thence northeastwardly with Maryland avenue seventy-eight feet (78) and nine inches; thence southeastwardly at right angles to said Maryland avenue one hundred and eleven feet (111.21); thence east two feet (2,655); thence south one hundred and sixteen feet (116) to F street; thence west along said F street; one hundred and twenty-four feet (124) to the beginning.

Terms: One-third or all cash, at the option of the purchaser. If only part cash is paid the remainder will be payable in one
113 and two years, and to be secured by deed of trust on the property sold, with interest at six per cent. per annum. A deposit of two hundred dollars ($200) will be required at time of sale, and purchase completed in twenty days thereafter, or the trustee reserves the right to resell at risk of defaulting purchaser. Taxes paid to date and title good.

LEO SIMMONS,
Trustee, Columbian Building.

jy9-d&ds.

Order Postponing Sale.

Filed July 26, 1901.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBURN ET AL. } Equity. No. 15141.

Upon consideration of the petition of John E. Roller this day exhibited to the court, it is, this 26th day of July, A. D. 1901, ordered that the parties to this cause show cause on the 9th day of September, A. D. 1901, or as soon thereafter as counsel can be heard, why the prayers of said petition shall not be granted; Provided a copy of this order be served on said parties or their solicitors of record within five days from this date; and it is further ordered that until the hearing is had, under this order that the trustee, Leo Simmons, be, and he hereby is, directed to withhold from sale the property mentioned in these proceedings.

By the court:

A. C. BRADLEY, *Justice.*

Answer of Allen C. Clark.

Filed September 9, 1901.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORN ET AL. } Equity. No. —.

Answer of Allen C. Clark to the rule to show cause.

Now comes Allen C. Clark, on behalf of himself and his cotenants, owners of the property involved in the proceedings in the above-entitled cause, and for answer to the rule to show cause and to the petition of John E. Roller, filed in this cause on the 26th day of July, 1901, says that the petitioner, John E. Roller, was made
114. party to the proceedings in this cause upon his own petition on the 25th day of January, 1894.

That said cause came on for final hearing on the 5th day of May, 1896, and thereupon the petition of said Roller was dismissed, and the court, on the 6th day of May, 1896, passed its decree for the sale and partition of the property involved, which decree is hereby referred to and made a part of this answer, and by said decree Victor Anderson, John A. Butler, Frederick G. Aukam and George E. Henderson were appointed commissioners to make such partition, and on the 29th day of May, 1896, said commissioners made their report to the court and the same was filed in this cause. Said report is hereby referred to and made a part of this answer.

That on the 30th day of June, 1896, said court passed its further decree ratifying and confirming said report, and by said decree Leo Simmons, Esq., was appointed to sell so much of the property therein described as was incapable of partition in kind. Said further decree is also made part of this answer.

Thereupon said John E. Roller duly prayed an appeal to the Court of Appeals from said decree dismissing his petition and from the decree for the partition and sale of said land, which appeal was duly allowed, but said Roller failed to prosecute same according to the rules of this court, and on the 24th day of October, 1898, said appeal was duly dismissed.

And for further answer the respondent says, as will appear from the proceedings, the heirs of one James Ward Scott were and have been for more than fifty years owners of one undivided fifth interest in the land involved; that said Roller, as will appear from his own evidence, was the attorney for said heirs at the time he acquired the tax title under which he claims, and while not pretending to have any title or claim against the title and interest of said

heirs, yet he pretends to have and hold title to the undivided interest owned and claimed by your respondent and his cotenants.

That said Roller well knows he has no title to said property, but is using the courts as a means of harassing the owners of said property other than heirs of said James Ward Scott for the purpose of extorting money from them. Respondent and his cotenants have repeatedly offered to reimburse said Roller for all taxes and assessments paid by him upon said land, but he refuses to accept same and pretends to own the property, hoping to force the owners thereof to sell to him at a mere pittance.

Your respondent is advised that the trustee in this cause is vested with and can convey an absolute good title to the property, and herewith files an abstract of title to same, prepared by the Real Estate Title Insurance Company of the District of Columbia, showing that a good, free-simple title can be conveyed by said trustee when the same is duly ratified by the court.

Respondent says that the claim of said Roller that he is in possession of said property is without foundation in fact, and avers, on the contrary, that at the beginning of this suit the defendant
115 Bartow L. Walker was in actual possession of said property, as will appear from his answer, and the said possession has so continued and the same is now in the actual possession of the parties claiming under and by license of said Leo Simmons, the trustee in this cause.

Wherefore, and for various other reasons appearing in the record, your respondent prays that said rule to show cause may be dismissed and that said Roller and those claiming under him may be perpetually enjoined and restrained by decree of this court from further claiming title to said property or in any manner interfering with the possession thereof or the sale of said property, and for such other and further relief as the nature of your respondent's case may require.

ALLEN C. CLARK.

LEO SIMMONS,
Sol'r for Pl'ff.

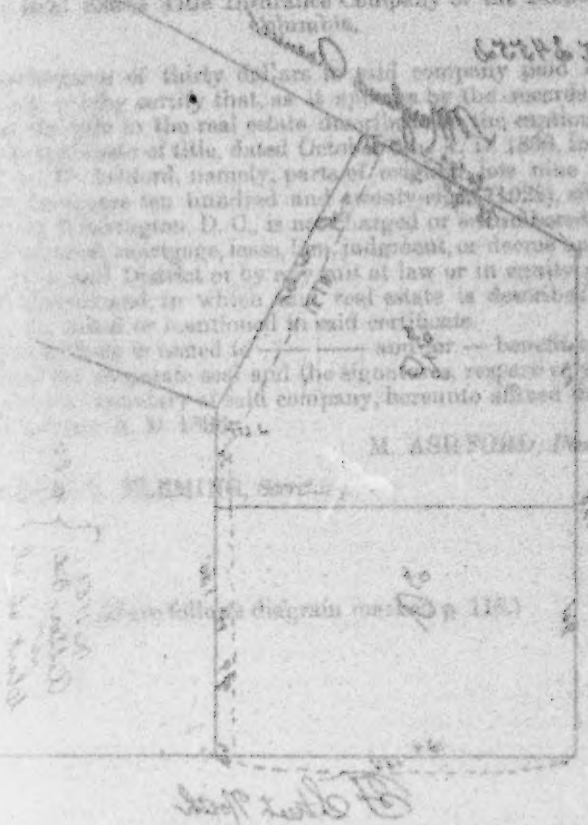
Sworn to and subscribed before me this fifth day of September, A. D. 1901.

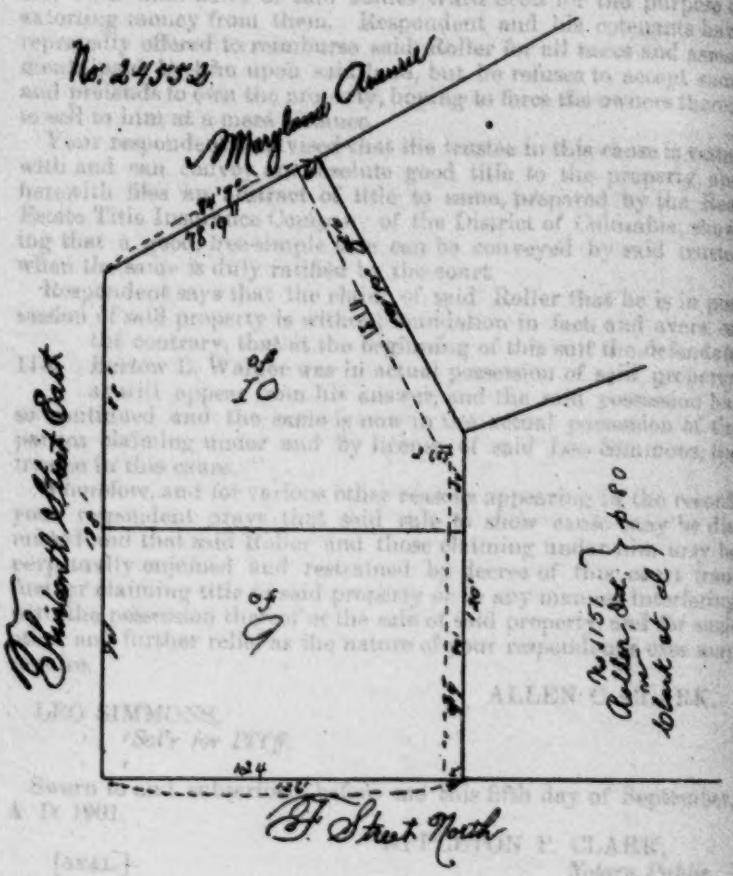
APPLETON P. CLARK,
Notary Public.

[SEAL.]

Filed September 9, 1901.

No. 24552.




No. 24553
Maryland Avenue
78.19
Thirtieth Street East
of 10
of 9
No 1151
Allen, &c.
et al
blank
F Street North

P. 116

Filed September 9, 1901.

No. 24552.

The Real Estate Title Insurance Company of the District of Columbia,

In consideration of thirty dollars to said company paid by —— ——, doth hereby certify that, as it appears by the records in said District, the title to the real estate described in the caption of the annexed certificate of title, dated October 6th, A. D. 1896, incl., and signed by M. Ashford, namely, parts of original lots nine (9) and ten (10), in square ten hundred and twenty-eight (1028), situate in the city of Washington, D. C., is not charged or encumbered by any unexpired trust, mortgage, lease, lien, judgment, or decree appearing of record in said District or by any suit at law or in equity pending in said District and in which said real estate is described, except such as are noted or mentioned in said certificate.

This certificate is issued to —— —— and for — benefit only.

Witness the corporate seal and the signatures, respectively, of the president and secretary of said company, hereunto affixed this sixth day of October, A. D. 1896.

[SEAL.] M. ASHFORD, *President.*

GEORGE E. FLEMING, *Secretary.*

(Here follows diagram marked p. 116.)

117 Real Estate Title Insurance Company, 470 Louisiana Ave.

No. 24552.

Certificate of Title.

Parts of original lots 9 and 10, in square 1028: Beginning for the same at the southwest corner of said lot 9, and running thence north along the line of Thirteenth street east 178 feet to the northwest corner of said lot 10; thence northeastwardly along the line of Maryland avenue 78 feet 9 inches; thence southeastwardly, at right angles to said avenue, 111.21 feet; thence east 2.655 feet; thence south 116 feet to F street, and thence west along the line of F street 124 feet to the place of beginning.

I have examined the title to the parcels of ground above described, and, as it appears of record, when sale by Leo Simmons, trustee under decree in equity cause No. 15,141, has been finally ratified, a proper conveyance by said trustee to the purchaser will, in my opinion, vest the purchaser with a good title, subject to a dower right in the wife of Samuel W. Young in a one undivided 90/6300 interest, the tax sales noted below, the payment of $38.38 owelty to the heirs of James W. Scott, and such taxes as may be due as to which the assessor will certify.

There is an outstanding tax title in John E. Roller, but as, under the decisions of our courts, said tax title is void, it is of no consequence unless Roller is in actual possession under it or has held adverse possession for over twenty years.

Concerning his title, Mr. Roller, in his testimony in the proceedings in equity cause No. 15141 (which were dismissed as to him), says that he was frequently in Washington between 1875 and 1887, and made it his business "to look after said lots to see that they were not depredated upon or interfered with," though he "took no steps to enclose them or utilize them in any way."

In a subsequent part of his testimony he says that "after he became the owner of the property, he got Mr. George R. Arrington to build a fence around the property for him."

According to the record Roller had no title prior to 1887.

Tax-list made April 22nd to 30th, inclusive, 1890.

Assessed to J. S. Irwin.
Sold to Allen C. Clark.

Tax sale.
Recorded May 10, 1890, Liber 1500, folio 1.
Lot 10.

Open—

Tax sales made April 7th to 20th, inclusive, 1891.

Assessed to J. S. Irwin.
Sold to Allen C. Clark.

Tax sale.
Recorded April 30, 1891, Liber 1576, folio 316.
Lots 9 and 10.

Open—

118 Tax sales: April 11th to 22nd, 1893.

Recorded May 1, 1893, Liber 1797, folio 466.
Lot 10.

Assessed to Joseph S. *Irvin*.
Sold to Allen C. Clark.
Open—

List of tax sales made in 1895.

Tax sale.
Recorded May 4, 1895, Liber 2022, folio 1.
Lot 10.

Assessed to Lydia Hoagland.
Sold to Allen C. Clark.
Open—
[SEAL.]

M. ASHFORD.

October 6th, 1896, incl.

Endorsed: No. 24552. Certificate of title. Square 1028. Parts of orig. lots 9 and 10. Take notice that for each instrument of writing noted on this certificate within one month from its date a fee of two dollars will be collected. From the Real Estate Title Ins. Co., 470 Louisiana avenue, Washington, D. C.

Answer of Leo Simmons.

Filed September 9, 1901.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORN ET AL.
No. 15141.

Now comes Leo Simmons, trustee, and for answer to the petition of John E. Roller, filed in this cause on the 26th day of July, 1901, and to the rule to show cause based upon said petition, says:

That he has read the answer of Allen C. Clark to said rule and adopts the whole of same as part of his answer.

And for further answer says that the court is without authority to entertain said petition or to grant the prayer based thereon.

That the things and matters set forth in said petition, in so far as it alleges any right or title existing in said Roller to the real estate involved, are without foundation; that said Roller has had his day in *cause* and all the matters and things alleged and set forth by him in said petition are and have been fully adjudged.

And, further answering said petition, your trustee reports that it will be impossible for him to properly execute the trust by selling the property involved if said Roller is allowed to harass and interfere with him in relation thereto.

That unless the court will interfere by its order or decree
119 enjoining and restraining said Roller from in any manner interfering with the sale of said property or the possession thereof it will have to be sold at a sacrifice, which your trustee believes is the sole object of said Roller; hoping thereby to prevent competition at such sale in order that he may eventually acquire such property at a sacrifice, either for himself or the defendant, the heirs of James Ward Scott, whom said Roller represents as counsel.

Your trustee further says that the reason he did not offer said property for sale before doing so on July —, 1901, was because of the fact that the market or demand for such property has been very poor, and upon advice from the parties interested he refrained from offering it for sale until such time as a fair price could be obtained.

Your trustee therefore suggests to the court that an order be passed injoining said Roller from further interfering in any way, either with the possession of said property or the sale therefore by your trustee; that if the court is of the opinion that said Roller has any rights in the premises that he be required to litigate in relation to the fund arising from the sale in lieu of the property; otherwise the beneficiaries of same will suffer great loss and injury.

LEO SIMMONS, *Trustee.*

Subscribed and sworn to before — this 9th day of September, 1901.

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Clerk.*

Decree Dismissing Petition.

Filed November 6, 1901.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORNE ET AL. } Equity. No. 15141.

This cause having come on for consideration upon the petition of the intervenor, John E. Roller, filed herein on the 26th day of July, A. D. 1901, the rule to show cause issued thereon, and the answers to said petition, and having been argued by the counsel and submitted on the 9th day of September, A. D. 1901, and considered by the court, it is, this 6th day of November, A. D. 1901, adjudged, ordered, and decreed that the prayers of the said petitioner be, and the same are hereby, denied; that the said petition be, and the same is hereby, dismissed, and that the said rule to show cause be, and the same is hereby, discharged with costs to the complainants, for

which they may have execution as at law, and the order to the trustee, Leo Simmons, Esq., to suspend or postpone the sale of the property involved herein be, and the same is hereby, revoked.

T. H. ANDERSON, *Justice.*

120 *Mandate.*

Filed February 20, 1903.

UNITED STATES OF AMERICA, ss:

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas, lately in the supreme court of the District of Columbia, before you or some of you in a cause between Allen C. Clark and Sarah P. Clark, his wife, complainants, and Sallie Osburn, *et al.*, defendants, equity No. 15141, wherein the decree of the said supreme court, entered in said cause on the sixth day of November, A. D. 1901, on the intervening petition of John E. Roller, is in the following words, viz:

"This cause having come on for consideration upon the petition of the intervenor, John E. Roller, filed herein on the 26th. day of July, A. D. 1901, the rule to show cause issued thereon, and the answers to said petition, and having been argued by the counsel and submitted on the 9th day of September A. D. 1901, and considered by the court, it is, this 6th day of November, A. D. 1901, adjudged, ordered and decreed that the prayers of the said petitioner be, and the same are hereby denied, that the said petition be, and the same is hereby dismissed, and that the said rule to show cause be, and the same is hereby, discharged with costs to the complainants, for
121 which they may have execution as at law, and the order to the trustee, Leo Simmons, Esq., to suspend or postpone the sale of the property involved herein be, and the same is hereby, revoked.

T. H. ANDERSON, *Justice.*"

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal taken by John E. Roller, intervenor, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the term of April, in the year of our Lord, one thousand nine hundred and two, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered adjudged and

decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby reversed, with costs; and that the said John E. Roller recover against the said Allen C. Clark et *al.*, one hundred and seventeen dollars and twenty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings not inconsistent with the opinion of this court.

APRIL 1, 1902.

122 You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals the 20th. day of *further* in the year of our Lord one thousand nine hundred and three.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Costs of John E. Roller.

Clerk	$18.20
Printing record	99.00
	$117.20
Record	27.00

123 *Election Parties in Record, &c.*

Filed November 27, 1903.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX.
vs.
SALLIE OSBURN ET AL. } Equity. No. 15141.

Now come the complainants and the defendants other than the defendants who claim as heirs at law and devisees of James Ward Scott and show unto the court that they are now in possession of the property involved in litigation. That as appears by the proof in this case they were in possession at the beginning of this suit and at the time John E. Roller, the intervenor, was dismissed from this suit, and at the time the decree for partition and sale was passed; and at the time the intervenor, John E. Roller, made appli-

tion for a further hearing on his intervening petition and therefore it is impracticable for them to bring an action in ejectment against him. That he, the said Roller, has had his day in court and the case has been fully adjudicated against him, therefore they elect to stand upon the proceeding- had in the case, as they appear from the entire record in said cause.

LEO SIMMONS,
Att'y for the Parties.
JOHN RIDOUT,
Solicitor for Parties Represented of Record by Him.

124 *Final Decree.*

Filed January 6, 1904.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET UX. *vs.* SARAH OSBORNE ET AL. } Equity. No. 15141.

This cause comes in for further hearing upon the mandate of the Court of Appeals herein, on the appeal of John E. Roller the intervenor, against Allen C. Clark and others appellees, and the defendants, having through their attorney, elected to stand upon the proceedings had, it is thereupon this 6th day of January, A. D. 1904, adjudged, ordered and decreed that the bill of complaint, and the amended bill of complaint exhibited in this cause be and the same are hereby dismissed, without prejudice however to the rights of said complainants, or to the rights of any of the parties to said cause to prosecute such other action or pursue such remedies for the protection of their respective interests as they may be advised. Such dismissal as aforesaid, to be with costs to the intervenor John E. Roller, to be taxed by the clerk, including the costs of said appeal to the Court of Appeals, and that he have execution therefor.

From this decree the complainants and the defendant, Bartow L. Walker, in open court, note their appeal to the Court of Appeals and the bond to be given on such appeal to operate as a supersedeas is here fixed at one thousand dollars ($1000). Counsel for Roller insists that there is no appeal from this decree.

By the court,

THOS. H. ANDERSON, *Justice.*

125 *Memorandum.*

January 7, 1904.—Appeal bond filed.

Instructions to Clerk for Preparation of Record.

Filed January 26, 1904.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL.
vs.
SALLIE OSBORN ET AL. } Equity. No. 15141.

The clerk in preparing the record for the appeal, will include therein the following:

1. Bill of complaint; Nov. 24th, 1893.
2. Petition of John E. Roller; Jan. 23rd. 1894.
3. Order admitting Roller as party; Jan. 25th. 1895.
4. Answer of John E. Roller; Feb. 13th. 1894.
5. Amended bill; June 12th, 1894.
6. Plea of John E. Roller; Nov. 24th, 1894.
7. Replication of John E. Roller; Jan. 21st. 1895.
8. Deposition of Bartow L. Walker; 1895.
9. Stipulation of counsel as to heirship; Dec. 10th, 1901.
10. Deed, Exhibit H.
11. " " I.
12. " " J.
13. " " K.
14. Deed, Exhibit L.

126 15. Deposition on behalf of complainants of John E. Roller; *Jan. 7th. 1896.*

16. Deposition of William Marche; Jan. 7th. 1896 behalf of—
17. " " John Herrell; Jan. 7/1896, behalf of Roller.
18. " " Martin Whelply " " " " " "
19. " " Return J. Meigs " " " " " "
20. " " Anna M. Barry " " " " " "
21. " " Geo. F. Schayer " " " " " "
22. " " John E. Roller on his own behalf
23. " " Deposition of D. S. Mackall
24. " " William Myers.
25. Exhibit A. and papers pertaining thereto, namely, copies of bill in equity No. 14,468; demurrer thereto, and order sustaining same and discontinuing suit *suit*, by attorney for complainant, all filed Jan. 7th. 1896.
26. Decree dismissing Roller; May 5th. 1896.
27. Notation of appeal therefrom and order fixing bond.
28. Decree for partition and appointing commissioners, *May 6th, 1896.*
29. Report of commissioners, May 29th, 1896.

30. Ratification of commissioners' report; June 30th, 1896, and order for sale.
31. Dismissal of Roller's appeal; Oct. 24th, 1896.
32. Petition of John E. Roller; July 26th. 1901, and Exhibits 1, 2 and 3 thereto.
33. Order to show cause; July 26th, 1901.
34. Answer of Allen C. Clark, Sept. 9th, 1901.
35. Abstract of title by Ashford, Sept. 9th. 1901.
36. Answer to rule, by Leo Simmons " " "
37. Order denying prayer and dismissing petitioner, Nov. *6th, 1901.*

127 38. Mandate of Court of Appeals; Feb. 20th, 1903.
39. Statement of complainants as to possession, Nov. 27/1903.
40. Order dismissing bill and notation of appeal in open court, fixing bond etc., Jan. 6th. 1904.
41. Bond approved; Jan. 7th, 1904.

LEO SIMMONS,
Attorney for Complainant.

Copy served on attorney for Roller January 26, 1904.

128 *Order Extending Time to File Transcript.*

Filed February 8, 1904.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK ET AL. vs. SALLIE OSBORN ET AL. } Equity. No. 15141.

Upon motion of the appellants and it appearing to the court that the clerk will be unable to prepare the record in the case in time to file the same in the Court of Appeals, within forty days from the filing of the bond in this case, it is therefore this 8th. day of February, 1904, ordered, that the time for filing said record in the appeal in this case, be, and the same is hereby extended to March 10th. 1904.

ASHLEY M. GOULD, *Justice.*

129 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 128, inclusive, to be a true and correct transcript of the record, as

per directions of counsel herein filed, copy of which is made part of this record, in cause No. 15,141, in equity, wherein Allen C. Clark *et al.* are complainants, and Sallie Osburn *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 18th day of February, A. D. 1904.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

130 [Endorsed:] District of Columbia supreme court. No. 1408. Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, appellants, *vs.* John E. Roller, intervener. Court of Appeals, District of Columbia. Filed Mar. 1 1904 Henry W. Hodges, clerk.

131 Court of Appeals of the District of Columbia, January Term, 1904.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and Bartow L. Walker, Appellants,
vs.
JOHN E. ROLLER, Intervenor, Appellee.
} No. 1408.

Motion to strike from the transcript of record all that portion thereof which was not included in the record on the former appeal in this case and to affirm the decree entered in pursuance of the mandate of this court on the former appeal.

Now comes the appellee John E. Roller and moves the court to strike from the transcript of record, filed in this court for the purposes of the pending appeal, all that portion thereof which was not included in the record on the former appeal to this court and to affirm the decree entered in pursuance of the mandate of this court on the former appeal and for reasons in support of said motions, states as follows:—

The transcript of record filed in the clerk's office of this court for the purposes of the present appeal contains the following matter, no part of which was contained or included in the transcript of record on the former appeal of this case to this court, namely,

1. Depositions of John H. Walter, pages 14 to 37 inclusive, of the transcript of record.
2. Notice of appeal by Roller, filed May 21, 1896 page 97.
3. Leave to deposit $100 for costs of appeal page 98.
4. Appointment of commissioners page 103.
5. Return of commissioners pages 99, 102 and 104.
6. Decree confirming report of commissioners pages 105 to 107.

7. Dismissal of Roller's appeal page 108.
8. Election parties in record &c. page 123; all of which
132 will clearly appear by comparison between the transcript of record on the former appeal and that filed for the purposes of the present appeal.

This omission has been supplied by agreement of counsel.

And the appellee further shows unto this honorable court that a certain stipulation of counsel waiving the oath to the petition of the appellee Roller, has been omitted from the transcript of record, made up for the present appeal, said stipulation being found on printed page 49 of the record of the former appeal to this court.

The purposes of this motion being to make the transcript of record on this appeal confirm to the transcript of the record on which this court tried and determined the former appeal in this case.

The decree from which the present appeal is taken, having been entered in accordance with the mandate of this court on said former appeal.

D. S. MACKALL,
Att'y for Appellee Roller.

DISTRICT OF COLUMBIA, ss:

I, John E. Roller, being first duly sworn do upon oath depose and say that I am the appellee in the above entitled cause, that I have examined the transcript of record made for the purposes of the pending appeal; that said transcript contains the matters and papers specified in the foregoing motion, which did not constitute a portion of the record on the former appeal of this case to this court and there has been omitted from the said transcript a certain paper in the nature of a stipulation of counsel, which is found on printed page 49 of the record on the former appeal; that it is material and necessary to the proper disposition of the pending appeal; that the transcript of record shall confirm to the transcript of record on the former appeal; that this motion is not made for delay but simply for the purposes of bringing the pending cause before the
133 court on its merits.

JOHN E. ROLLER.

Subscribed and sworn to before me this 2nd day of May, 1904.

W. MOSBY WILLIAMS,
Notary Public, D. C.

[NOTARIAL SEAL.]

(Endorsed:) No. 1408. Allen C. Clark, *et al. vs.* John E. Roller, intervenor. Motion to strike out portions of record. Court of Appeals, District of Columbia. Filed May 10, 1904. Henry W. Hodges, clerk.

134 TUESDAY, *May 10th, A. D.* 1904.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and Bartow L. Walker, Appellants,
vs.
JOHN E. ROLLER, Intervener. } No. 1408.

The motion to strike from the transcript of the record all that portion thereof which was not included in the record on the former appeal and to affirm the decree entered in pursuance of the mandate of this court, was submitted to the consideration of the court by Mr. D. S. Mackall in support of motion, and by Mr. Leo Simmons in opposition thereto, with leave to appellants to file brief herein in seven days.

135 Court of Appeals of the District of Columbia, January Term, 1904.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and Bartow L. Walker, Appellants,
vs.
JOHN E. ROLLER, Intervenor, Appellee. } No. 1408.

It is hereby stipulated and agreed by and between counsel for the respective parties that the stipulation waiving the oath to Roller's petition found in the printed record on the former appeal in this case on page 49, a true copy of which is hereto attached, shall be inserted in the transcript of record filed in this court for the purposes of the present appeal, the same having been omitted by mistake.

D. S. MACKALL,
Att'y for Appellee.
LEO. SIMMONS,
Att'y for Appellants.

In the Supreme Court of the District of Columbia.

ALLEN C. CLARK
vs.
SALLIE OSBORNE ET AL. } Equity. No. 15141.

The intervenor, John E. Roller, desiring to appeal to the Court of Appeals from the order denying the prayers of his petition filed in this cause on July 26, 1901, it is hereby stipulated and agreed by and between counsel for the respective parties in this cause that the petition filed in this cause on said date by said John E. Roller shall have the same force and effect, in so far as the rules of practice of

the supreme court of the District of Columbia require the same to be sworn to, as if said petition had been regularly sworn to by the said petitioner; but this shall not be in any way construed as
136 an admission of an allegation set forth in said petition.

LEO SIMMONS,
Attorney for Plaintiff and Certain Defendant.
JOHN E. ROLLER, *Intervenor*,
By D. S. MACKALL, *Attorney.*

(Endorsed:) No. 1408. Court of Appeals District of Columbia. Allen C. Clark *vs.* John E. Roller. No. 1408. Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed May 11, 1904. Henry W. Hodges, clerk.

137 TUESDAY, *May 24th, A. D.* 1904.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and BARTOW L. WALKER, Appellants,
vs.
JOHN E. ROLLER. } No. 1408.

On consideration of the appellee's motion to strike from the transcript of the record all that portion thereof which was not included in the record on the former appeal, it is by the court this day ordered that so much of said motion as relates to paragraph eight be, and the same is hereby denied, and so much of said motion as relates to paragraphs 1 to 7 inclusive, be and the same is hereby, granted.

Per MR. JUSTICE SHEPARD.

May 24, 1904.

138 ALLEN C. CLARK ET AL.
vs.
JOHN E. ROLLER, Intervenor. } No. 1408.

A former motion to correct the record in this case having been dismissed for its failure to comply with the rule governing in such cases, the present motion has been made in proper form.

As regards the paper described in paragraph 8, the motion is denied, as that paper, whilst informal and probably intended for another purpose, may be accepted as an express declination of the option given in the decree of reversal, the failure to accept which necessitated the dismissal of the complainant's bill in compliance with the mandate of this court.

In respect of the parts of the transcript specified in paragraphs 1 to 7, inclusive, the motion will be sustained, because not having been incorporated in the transcript, presented in the original appeal by the appellants, they cannot now be introduced in an attempt to obtain a review of the decree then rendered.

As the record, amended in the respects mentioned, is the same before passed upon, and as the final decree now appealed from was entered in direct accord with the mandate of this court, the motion to affirm will also be granted.

The decree is therefore affirmed, with costs. *Motion granted, and decree affirmed.*

SETH SHEPARD,
Associate Justice.

(Endorsed:) No. 1408. Allen C. Clark, *et al.*, appellants, *vs.* John E. Roller. Opinion of the court per Mr. Justice Shepard. Court of Appeals, District of Columbia. Filed May 24, 1904. Henry W. Hodges, clerk.

139 TUESDAY, *May 24th, A. D.* 1904.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and Bartow L. Walker, Appellants,
vs.
JOHN E. ROLLER.
} No. 1408. April Term, 1904.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and on a motion to affirm which was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE SHEPARD.

May 24, 1904.

140 In the Court of Appeals of the District of Columbia.

ALLEN C. CLARK ET AL., Appellants,
vs.
JOHN E. ROLLER, Intervenor, Appellee.
} No. 1408.

Now come the appellants and pray an appeal to the Supreme Court of the United States from the decree of this court, entered in this cause on the 24th day of May 1904, whereby the decree of the court below was affirmed and a part of the record in the case stricken out.

LEO. SIMMONS,
Att'y for Appellants.

(Endorsed:) No. 1408. Allen C. Clark, *et al.*, appellants, *v.* John E. Roller, intervenor, appellee. Motion for allowance of appeal to Supreme Court of U. S. Court of Appeals, District of Columbia. Filed Jun- 8, 1904. Henry W. Hodges, clerk.

WEDNESDAY, *June 8th, A. D.* 1904.

ALLEN C. CLARK, SARAH P. CLARK, His Wife, and BARTOW L. WALKER, Appellants,
vs.
JOHN E. ROLLER, Intervener. } No. 1408.

On motion of Mr. Leo Simmons, attorney for the appellants in the above entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond to act as supersedeas is fixed at the sum of one thousand dollars.

141 (*Bond on Appeal.*)

Know all men by these presents, that we, Allen C. Clark and Bartow L. Walker, as principal-, and Appleton P. Clark and Victor Anderson, as sureties, are held and firmly bound unto John E. Roller in the full sum of one thousand ($1000.00) dollars, to be paid to the said John E. Roller certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of June, in the year of our Lord one thousand nine hundred and four.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between Allen C. Clark and wife and Bartow L. Walker appellants and John E. Roller, intervener, appellee, a decree was rendered against the said Allen C. Clark and wife and Bartow L. Walker and the said Allen C. Clark and wife and Bartow L. Walker having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said John E. Roller, intervener citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Allen C. Clark and Bartow L. Walker shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their

plea good, then the above obligation to be void; else to remain in full force and virtue.

ALLEN C. CLARK. [SEAL.]
BARTOW L. WALKER, [SEAL.]
By LEO SIMMONS, *Att'y.* [SEAL.]
APPLETON P. CLARK, JR. [SEAL.]
VICTOR ANDERSON. [SEAL.]

Sealed and delivered in presence of—
HOWARD ETCHISON.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals
of the District of Columbia.

O. K.
D. S. MACKALL,
Att'y for Roller.

[Endorsed:] No. 1408 Allen C. Clark and Bartow L. Walker, appellants *vs.* John E. Roller, intervener, appellee. Supersedeas bond on appeal to Supreme Court U. S. Court of Appeals District of Columbia Filed Jul-. 11. 1904 Henry W. Hodges clerk.

142 UNITED STATES OF AMERICA, *ss:*

To John E. Roller, intervener, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the appellants should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 11th day of July, in the year of our Lord one thousand nine hundred and four.

R. H. ALVEY,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted
July 11, 1904.
D. S. MACKALL,
Att'y for Appellee Roller.

143 [Endorsed:] Court of Appeals District of Columbia. Filed Jul- 13, 1904 Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing pages numbered from 1 to 122 inclusive, contain a true copy of the record and proceedings of said Court of Appeals in the case of Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, appellants, *vs.* John E. Roller, intervener No. 1408, April term, 1904, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Court of Appeals, at the city of Washington, this 21st day of July A. D. 1904.

HENRY W. HODGES,

Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,432. District of Columbia Court of Appeals. Term No. 332. Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, appellants, *vs.* John E. Roller, intervenor. Filed August 3rd, 1904. File No. 19,432.

In the Court of Appeals of the District of Columbia.

ALLEN C. CLARK and Others, Appellants,
vs.
JOHN E. ROLLER, Intervenor, Appellee. } No. 1408.

Now comes the appellee, John E. Roller and suggests to the court that the appeal taken to the Supreme Court of the United States by Allen C. Clark, and others on the 8th day of June, 1904, may have the effect of bringing up the entire record for review before the Supreme Court of the United States, and prays a cross-appeal to the said Supreme Court of the United States from the decree of this court and those of the supreme court of the District of Columbia.

JOHN E. ROLLER, Appellee.

(Indorsed:) No. 1408. Allen C. Clark, *et al.*, vs. John E. Roller. Application for allowance of cross-appeal. Court of Appeals, District of Columbia. Filed Oct. 4, 1905. Henry W. Hodges, clerk.

TUESDAY, October 10th, A. D. 1905.

ALLEN C. CLARK ET AL., Appellants,
vs.
JOHN E. ROLLER, Intervenor, Appellee. } No. 1408.

It being suggested to the court by John E. Roller, intervenor, that the appeal taken in this cause by Allen C. Clark and others, appellants, on the eighth day of June, 1904, to the Supreme Court of the United States, perhaps has the effect of bringing the entire record for review, it is, upon motion of the said John E. Roller, by his counsel, ordered by the court that he be allowed a cross-appeal to the Supreme Court of the United States, and that he be required to give bond upon such cross-appeal in the sum of three hundred dollars, conditioned according to law.

SETH SHEPARD,
Chief Justice.

(Bond on Appeal.)

Know all men by these presents, that we, John E. Roller, intervenor, as principal, and James O. Roller, as surety, are held and firmly bound unto Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker in the full and just sum of three hundred ($300.00) dollars, to be paid to the said Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirteenth day of October, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, appellants, vs. John E. Roller, intervenor, appellee a decree was rendered against the said Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, and the said John E. Roller, intervenor having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said John E. Roller intervenor shall prosecute said appeal to effect, and answer all damages and costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN E. ROLLER. [SEAL.]
JAMES O. ROLLER. [SEAL.]

Sealed and delivered in presence of—
MILTON STRASBURGER.

Surety O. K.
LEO SIMMONS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1408. Allen C. Clark, *et al.* appellants vs. John E. Roller, intervenor Bond on cross-appeal to Supreme Court, U. S. Court of Apppeals District of Columbia Filed Oct. 13, 1905. Henry W. Hodges, clerk.

UNITED STATES OF AMERICA, ss:

To Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein John E. Roller, intervener, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 13th day of October, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

OCT. 17", 1905.

Service of copy of this citation is hereby acknowledged.

LEO SIMMONS,
Att'y for Clark *et al.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 2, 1905. Henry W. Hodges, clerk.

Court of Appeals, District of Columbia, April Term, 1902.

JOHN E. ROLLER, Appellant,
vs.
ALLEN C. CLARK ET AL., Appellees. } No. 1151.

Petition for Rehearing.

Come now the appellees, Allen C. Clark and Sarah P. Clark, his wife, by their solicitor, and pray the court to grant a rehearing of this cause for the reasons hereinafter appearing.

The court in its opinion begins its consideration of the case with the following statement:

"The appellant John E. Roller appeals from a decree passed November 6, 1901, dismissing his *bill of intervention* in a partition suit pending in the supreme court of the District."

That this statement indicates a misapprehension of the appeal is evident from the history of the cause, which is as follows:

On January 14, 1893, the appellees, Allen C. Clark and wife, filed in the supreme court of the District of Columbia their bill of complaint for a partition of certain lots in square 1028, in the city of Washington. To this bill the appellant, Roller, was made party, the allegation as to him being that he claimed title to the lots under a certain sale for taxes, which was alleged to be void. Roller demurred to this bill, and his demurrer was sustained, and the bill as to him was dismissed. Thereupon the bill was dismissed by the complainants as to all of the defendants, and a new bill was filed *omitting Roller* as a party defendant.

Upon the filing of the new bill Roller presented his petition for leave to intervene upon the precise ground stated in the first bill for making him a party, namely, that he claimed sole ownership of the property in question under a tax sale; and on this petition he

was made a party defendant, with leave to appear and plead, demur or answer, as he might be advised, notwithstanding that neither he nor his claim was mentioned in the bill, and that accordingly there was nothing to which he could possibly plead, demur or answer (R., 8, 9). Before any change in the bill, and accordingly before there was in the cause any allegation to which he could by any possibility be called upon to plead, demur or answer, Roller filed an "answer," responding to the allegations of the bill, none of which was directed to him, and, in addition, *setting forth his own claims* to the property (Rec., 9–12). The complainants, conceiving such a course necessary, filed an amendment and supplement to their bill, setting forth Roller's claim and stating in terms that such amendment and supplement was filed *in view of the making of Roller, upon his petition, party to the cause* (Rec., 12, 13).

To this Roller pleaded the dismissal of the earlier bill and adopted his answer filed before the filing of the amendment and supplement. In other words, in addition to answering the bill to which he was not a party, he alleged that because of the former adjudication the new bill ought to be dismissed as to him, who would never have been made a party thereto but for his own request.

On the hearing of the new bill, May 5, 1896, it was dismissed as to Roller, *as he prayed*, but retained for further proceedings as to the other parties (Rec., 15).

Thus far the opinion of this court in effect correctly states the facts, omitting, however, to note the irregularity of Roller's answer and the fact that the "supplemental petition," as it is called in the opinion, was filed, not voluntarily, but because the court below had permitted Roller to intervene. And the opinion also fails to state or to notice the very important fact mentioned in the brief for the appellees (p. 4), but not appearing in the record and now supplied by the stipulation herewith filed, namely, *that Roller appealed from the decree just mentioned, but that he failing to prosecute his appeal, the same was dismissed October* 24, 1898.

On the day following its decree dismissing the bill as to Roller, viz., on May 6, 1896, the court passed a decree for partition among the other parties, with which decree, of course, Roller had nothing to do (Rec., 15–17).

It was not until the trustee appointed by the court was proceeding to sell a portion of the property for the purposes of partition that Roller again appeared upon the scene. This was through his petition of July 26, 1901, *more than five years and two months after the decree dismissing the bill as to him.*

This petition is unique. Notwithstanding that (1) Roller had been made party to the first bill and had had it dismissed because he ought not to have been made party thereto, (2) on his own petition he had been made party to the second bill, and on his own prayer procured its dismissal as to him, and (3) had appealed from the very decree so dismissing the bill as to him, and had suffered his appeal to be dismissed and a lapse of time to follow such

as to prevent his appealing anew, he asks by this petition to be permitted to do the very thing which he first objected to, and then asked to have done only in order to show that it ought never to have been done.

This feature of the case is not considered in the court's opinion, nor does the opinion consider what right, if any, Roller had to appeal in a case from which, by the decree of dismissal, he was excluded, and excluded by a decree one appeal from which was dismissed and from which a second appeal is now impossible; and whether or not there was an appeal is immaterial, seeing that the decree is so as that any appeal at the time of Roller's last petition was impossible.

But, it may be suggested, the opinion holds that the decrees dismissing the bill as to Roller and directing partition among the other parties are not final. As to this, three considerations present themselves:

1. This question was not argued on the hearing, and it is deferentially submitted that a decree which expels a party from a cause is certainly final *as to him*; and where, as here, he is the only appellant, upon what principle can the court have the cause before it, seeing that, first, he took an appeal which was dismissed; and, secondly, if he did not, it is now too late for an appeal?

2. *The present appeal is not from the decrees of May 5 and May 6, 1896*, but from an order (Rec., 48) denying the petition of Roller to stop the sale, notwithstanding the previous history of the cause as above set forth.

And if it be further suggested that this court has rendered its opinion upon the appeal from the order of November 6, 1901 (Rec., 48), the obvious answer is that on its own reasoning such an order is not final. That order provides only as follows:

(1.) The prayers of the petition of July 26, 1901, are denied. These prayers are (*a*) for leave to intervene (which had already been granted and had resulted in a dismissal of the suit as to the intervenor *on his own prayer*), (*b*) for summons, (*c*) for enjoining the sale, (*d*) for leave to take testimony (although all testimony thought to be necessary had been taken and *on that testimony* the bill had been dismissed as to the petitioner), (*e*) that all proceedings subsequent to May 5, 1896, might be annulled and "*this cause finally*" *dismissed!* (notwithstanding the other interests than those of the appellant involved and notwithstanding that the dismissal of the bill on May 5, 1896, had put the appellant out of the case), and (*f*) for general relief.

(2.) The petition is dismissed.

(3.) The rule to show cause on the petition is discharged; and

(4.) The order staying the sale is revoked.

In all this what is there that can be said to partake of the nature of a final order or decree? especially in view of the fact that it is merely an order refusing to stay execution of a decree which in its opinion this court says was not final—for how can the mere carry-

ing out of an interlocutory decree make it final? And the appellant being by the decree of May 5, 1896, out of the case, how can he be said in any way to be aggrieved by the court's action?

The simple fact is that the appellant, having defaulted on his appeal from the decree of May 5, 1896 (which put him out of the cause), and never having appealed from the decree of the following day (which alone provided for a partition and sale), has, through *the medium of a petition to the court below to suspend the execution* of the latter decree, *to which he was not a party*, prevailed upon this court to convert his appeal from a denial of that petition into an appeal from the decrees of both May 5 and May 6, 1896, and to give him affirmative relief in a cause from which he long ago disappeared *on his own request* and in respect of a contention on his part not affected in the least by the continuance of the litigation among the original parties thereto.

And if it be, as suggested in the opinion, that the proper course of the court below, upon the manifestation of Roller's claim of title, was to suspend all proceedings and give the complainants reasonable time to establish a title at law, or else to dismiss their bill without prejudice, leaving all parties to pursue such remedies for the protection of their interests as they might be advised, the plain answer would seem to be that inasmuch as Roller was the only person who could introduce into the *course* a contention making such a course proper; and inasmuch, further, as he invited himself into the cause for the express purpose of being asked out of it, in which he was successful; and inasmuch as the action of the court below, on his request, in putting him out of the cause has left in it no one disputing or in position to dispute the title set up in the bill, the suggestion of the court in the premises is (be it said respectfully) purely gratuitous and wholly without the scope of the proceedings as left by Roller's elimination.

3. It seems to have been overlooked that after the decree of May 6, 1896, which directed the commissioners to divide the land in accordance therewith, the commissioners reported a division of the property, so far as it could be divided, setting off one-fifth to the heirs of James Ward Scott, and that this report, after being ratified *nisi*, was finally ratified on June 30, 1896, by a decree which, in addition to the ratification of the report, directed the other parties to convey to the heirs of James Ward Scott the one-fifth allotted to them, appointed a trustee to sell the remainder of the land that could not be divided, and directed the trustee to bring into court the money arising from the sale. This would clearly seem to be a final decree, for the act of Maryland, 1785, chapter 72, section 13, provides that such a decree shall pass title and have the effect of a deed. (See Abert's Compilation, p. 85, sec. 34.)

The cases cited in the opinion, namely, Perkins *vs.* Fourniquet, 6 How., 206; Fourniquet *vs.* Ewing, 16 How., 82, and Iowa *vs.* Illinois, 151 U. S., 238, do not seem to militate against the proposition that the decree of June 30, 1896, in this case was final. In the first case

the holding of the court was merely that a reference to a master subject to the approval by the court of the master's report was not final, whereas in this case the report of the commissioners was actually made and ratified. In the second case the order was that the complainants were entitled to two-sevenths of certain property and a reference was made to a master to take and report an account of it, reserving all other matters in controversy, and this was held not final, whereas in the present case the commissioners authorized to make a division reported, and their report was ratified and adopted; and in the third case, the decree appealed from directed a report of commissioners, who reported only as to a portion of the subject-matter referred, and it was held that a confirmation of this report as to such portion was not final, inasmuch as it did not cover the whole subject; whereas in the case at bar the report of the commissioners which was approved, did cover the whole subject. In the case at bar, not only were commissioners appointed to make a division, but also they actually made and reported such division, and their report was finally ratified, namely, on June 30, 1896. It would seem clear that this was a final decree, and that as the time for appeal from that decree had long since expired before the filing of the petition which is the subject of present consideration, the petitioner could not possibly have any standing in court.

As to the finality of the decree of June 30, 1896, the court is respectfully referred to the following cases:

Washington, etc., Company *vs.* Mayor, 7 Wall., 575;
Dean *vs.* Nelson, 7 Wall., 342;
Bank of Lewisburg *vs.* Sheffey, 140 U. S., 445;
Willard *vs.* Willard, 145 U. S., 116;
St. Louis, etc., Co. *vs.* Southern Express Co., 108 U. S., 24;
Winthrop Co. *vs.* Meeker, 109 U. S., 180; and
Ex parte Noughton, 108 U. S., 237.

And however all this may be, no argument was had on the point herein suggested and they are not considered in the court's opinion, and the court is earnestly prayed to grant a rehearing of the cause with a view to considering further whether (*a*) the appeal should have been entertained, or (*b*) the order appealed from should not be affirmed.

Respectfully submitted.

HENRY E. DAVIS,
For the Petition.

LEO SIMMONS,
HAMILTON & COLBERT,
JOHN RIDOUT,
For the Other Appellees.

TUESDAY, May 6th, A. D. 1902.

JOHN E. ROLLER, Intervenor, Appellant,
vs.
ALLEN C. CLARK and SARAH P. Clark, His Wife; Sallie Osburn, Alverda Osburn, *et al.*
No. 1151, April Term, 1902.

On consideration of the appellees' motion for a rehearing in the above entitled cause, it is by the court now here ordered that said motion be, and the same is hereby overruled with costs.

Per MR. JUSTICE SHEPARD.

May 6, 1902.

In the Court of Appeals of the District of Columbia.

ALLEN C. CLARK and Others, Appellants,
vs.
JOHN E. ROLLER, Intervenor, Appellee.
No. 1408.

The clerk will please prepare the record on the cross-appeal to the Supreme Court of the United States in the above-entitled cause, and include therein the following:

(1.) Motion of John E. Roller for allowance of cross-appeal, filed Oct. 4, 1905.

(2.) Order allowing cross-appeal, passed October 10, 1905.

(3.) Bond on cross-appeal, filed Oct. 13, 1905.

(4.) Citation and acknowledgment of service of copy.

(5.) Petition for rehearing, filed in cause No. 1151, April term 1902, by Allen C. Clark and Sarah P. Clark, his wife.

(6.) Order of court overruling motion for rehearing in cause No. 1151.

JOHN E. ROLLER, Intervenor.

(Indorsed:) No. 1408. Allen C. Clark, *et al.*, vs. John E. Roller, intervenor. Direction to clerk to prepare record on cross-appeal. Court of Appeals, District of Columbia. Filed Oct. 25, 1905. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 14, inclusive, contain a true copy of the proceedings and papers of said Court of Appeals, directed to be included in this transcript by the appellee in the case of Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, appellants,

vs. John E. Roller, intervener, No. 1408, October term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 25th day of October, A. D. 1906.

Seal Court of Appeals, District of Columbia.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,432. District of Columbia Court of Appeals. Term No. 72. Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker, appellants, vs. John E. Roller, intervenor. Filed August 3, 1904. File No. 19,953. Term No. 451. John E. Roller, intervenor, appellant, vs. Allen C. Clark, Sarah P. Clark, his wife, and Bartow L. Walker. Filed November 3d, 1905. File Nos. 19,432 and 19,953.

FILE COPY.

Office Supreme Court U. S.
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NOV 9 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

~~October Term, 1904.~~

October Term, 1905.
No. 72.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER,
Appellants
vs.
JOHN E. ROLLER,
Intervenor.

BRIEF FOR APPELLANTS.

LEO SIMMONS,
Attorney for Appellants.

MILANS, LAW PRINTER, 615 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.
No. 332.

OCTOBER TERM, 1905.
No. 72.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER,
Appellants
vs.
JOHN E. ROLLER,
Intervenor.

BRIEF FOR APPELLANTS.

Statement of Case.

As appears from the record, on January 14, 1893, the appellants, Allen C. Clark and wife, filed a suit in the Supreme Court of the District of Columbia, Equity Cause No. 14,468, for partition of Lots 8, 9 and 10 in Square 1028, situate in the City of Washington (Rec., p.

81). By the bill they set forth that they claimed title to same by mesne conveyance, through one, Abraham Young, who was seized and possessed of said property in the year 1800. There were many defendants to the bill, including the heirs-at-law of James Ward Scott, who it was alleged owned one-fifth interest, acquired from one of the heirs of said Young.

John E. Roller, appellee, was made defendant, it being alleged that he claimed title to the whole of the property under a tax sale of 1852. It was alleged by said bill that the tax sale and all proceedings therein were null and void, because the requirements of the law had not been complied with in making such sale (Rec., p. 87). (See par. 17 of bill.) By said bill it was further alleged that the claim of John E. Roller was a cloud upon the title of the complainants and ought to be removed, and a decree was prayed accordingly.

Roller demurred to the bill on two grounds: 1st, that the bill could not be maintained until the complainants' title had been settled at law; and 2d, that the complainants were guilty of laches (Rec., p. 79).

The cause was heard on said demurrer and the bill dismissed as to Roller only (Rec. p. 79). Thereupon the complainant, Clark, voluntarily entered his bill dismissed (Rec., p. 78). And on November 24, 1898, filed the new bill, equity cause No. 15,141, the original bill in this case (Rec., p. 2.) Said new bill contains substantially the same allegations as the former bill, and had the same parties, excepting said Roller and one Ledina Hoglen, who in the meantime had conveyed her interest to the defendant, Walker.

Thereupon, Roller obtained leave to intervene in the new suit (Rec., p. 9).

And filed an answer to the said original bill (Rec., p. 10). By said answer Roller admitted all of paragraphs 2 to 15 of said second bill, which paragraphs set forth the relationship of the parties to said young, deaths of their ancestors and traced title to the complainants and defendants to the bill other than said Roller. In answering the 16th paragraph of the second bill, which will be found on page 7, which sets forth that the complainants and the defendants to the bill, were entitled to have partition of the land by sale, Roller said, Rec., p. 10: "This respondent further admits that if the allegations in the bill be sustained and the contentions of this respondent overturned, then the statement made in paragraph 16, so far as he is informed and believes, is true."

The said answer of Roller further set forth that he claimed title under a tax sale made in April, 1852: payment of taxes by himself and those under whom he claimed, etc. He further charged unexplained laches: and finally set up the dismissal of the former suit as a bar (Rec., p. 9).

After Roller was admitted the second time as defendant, the appellant, Clark, filed a supplemental petition repeating practically the same allegations concerning the legality of Roller's title as in the bill as first filed (Rec., p. 13).

And to this supplemental bill, Roller pleaded the former decree sustaining his demurrer (Rec., p. 19). Notwithstanding, that Roller had admitted all the allegations in relation to the heirship, in tracing title, the complainant took proof sufficient to give the Court power to render a decree; none of said testimony, however, is contained in the record. Said Roller by stipulation in the case (Rec.,

p. 29) admitted that the title of which Abraham Young and John Young died seized, was vested in the parties, complainants and defendants, excepting said Roller. The deposition of the appellant, Bartow L. Walker (Rec., p. 16), tended to show that he purchased the undivided interest he held to the land in question of a person who was then in actual possession and his checks show what he paid for same (Rec., pp. 27, 28). The appellee, Roller, then took testimony in his own behalf (Rec., pp. 39 to 72). He personally testified that he purchased the property, then vacant lots in 1887: that he paid taxes and assessments against same; that he caused the erection of a fence and leased the same to one Myers, and in 1892 he discovered the fence had been torn down, and earth dumped on the lots. That some one else, whom he supposes to be one John H. Walter, had put up a fence around same.

Witness, Mr. Myers (Rec., p. 72), testified that the lots were fenced in 1887, and he kept his horse there until 1892, and in that year the fence was carried away and burned, and in the fall of the same year a man by the name of Davis, who claimed to own the lot adjoining, fenced the whole lots in. Said Roller also introduced evidence respecting the condition of the lots, at an early date, that they were gradually coming into value by the recent growth of the city. He also undertook to show that certain records pertaining to the tax sale had been lost. Other witnesses testified in behalf of said Roller (Rec., pp. 40 to 72), among whom was Return J. Meigs, clerk of the said court (Rec., p. 50), who showed conclusively that no such records had been lost or destroyed.

The case came on for hearing, and on May 5, 1898

(Rec., p. 90), upon the answers of all the parties and their proof, the late Mr. Justice Cox ordered the bill dismissed as to Roller, on the grounds that the Court had no jurisdiction over him. By said decree the cause was reserved for further proceedings between the other parties. On May 6, 1896, the said Court, Mr. Justice Cox (Rec., p. 90), passed a further decree directing partition of the property, and appointed Victor Anderson, John A. Butler, George Henderson, and Charles P. Stone, Commissioners to make partition.

By said decree the interest of the parties was specifically set forth, and the Commissioners were directed to make partition in accordance therewith.

On May 21, 1896, the appellee, Roller, entered an appeal from the decree in the case to the Court of Appeals. On May 20, the said Roller, obtained leave of Court to make a deposit of $100 in lieu of a bond as security for cost in the appeal (R., p. 92).

On May 29, 1896, said Commissioners, excepting said Stone, filed their report, setting forth that they had made partition of the land, so far as it was possible, by setting off the interest of the heirs of James Ward Scott in kind. That they had placed a money value upon all the several parts of the land and that they found it impractical to divide the land among the others, excepting that owned by the heirs of said James Ward Scott, without loss and injury to them. The plat (Rec., p. 96), shows how said land was proposed to be divided and the part set off to the heirs of said Scott.

On June 30, 1896 (Rec., 98), the report of said Commissioners was duly confirmed by Mr. Justice Cox, holding an Equity Court. And by said decree it was provided that the remainder of the land should be sold for

the purpose of partition among the parties to the cause, excepting said Roller, and the heirs of said James Ward Scott; and Leo Simmons was appointed trustee to make such sale. On October 24, 1898, the said Roller not having prosecuted his appeal, on motion of the complainants it was ordered that the appeal entered by said Roller, be dismissed (Rec., p. 99).

On June, 1901, the said Leo Simmons, trustee in said cause (Rec., p. 93), caused said property to be advertised for sale by public auction.

And on the 26th of July, 1901, the said Roller again filed a petition praying (Rec., p.100), 1st (Rec., p. 102), that he might have leave to intervene; 2nd, that he might have process against the parties; 3d, that he might have leave to introduce evidence; 4th, that a decree be passed annulling and avoiding all proceedings subsequent to May 5, 1896. On the same day said Roller filed his petition (Rec., p. 104) a rule to show cause was issued, requiring the parties to show cause on the 9th day of September, 1901, why the prayers of said Roller should not be granted, and the trustee was directed to withhold the sale of the property until the hearing (Rec., p. 104).

On September 9, 1901, the appellant, Clark, filed his answer to the rule to show cause (Rec., p. 105) setting forth the proceedings and denying Roller's right to further intervene in the case. And with this answer, said Clark, filed a certificate of title, by the Real Estate Title Insurance Co. (Rec., p. 107) showing the condition of the title to the lot at the time (see Rec., pp. 108, 109). And on said date, September 9, 1901, the said trustee, Leo Simmons, in response to the rule to show cause, filed an answer (Rec., pp. 109, 110) setting forth the reason why

the sale of the property had been delayed; that it was impossible for him to sell the property on account of being harrassed, etc. by the appellee, Roller, and that said Roller, representing the heirs of James Ward Scott, as attorney and wished to prevent competition at the sale, etc.

On November 6, 1901 (Rec., p. 110) the case came on to be heard upon the petition and rule to show cause, and thereupon the prayers of the petition was denied, the petition dismissed and the rule to show cause discharged; and thereupon said Roller, entered a second appeal to the Court of Appeals (Rec., p. 111). And on said appeal, the Court of Appeals reversed the decree of November 6, 1901 (Rec., p. 111) and remanded the case for further proceedings not inconsistent with the opinion (Rec., pp. 111, 112). The case being in the lower Court again, on November 27, 1903 (Rec., p. 112), the other parties to the cause filed in said Court a statement (Rec., pp. 112, 113) setting forth that it was impractical to comply with the decree of the Court of Appeals, for the reason that they were then in possession of the property and could not bring an action of ejectment.

On January 6, 1904, in obedience to the order of the Court of Appeals (Rec., p. 113), the said Supreme Court of the District of Columbia, passed a further decree, setting forth that the parties had elected to stand upon the proceedings, orderd, that the bill of complaint be dismissed and that cost in the case be awarded to said Roller. From this decree, which was directly at variance with the decree passed by Justice Cox eight years previous, the complainants and the defendants, Bartow L. Walker, appealed to the Court of Appeals (Rec., p. 113).

The appeal being entered in the Court of Appeals, the said Roller, thereupon moved the Court to strike from the transcript of the record certain portions, which he claimed had not been included in the record in the former appeal (Rec., pp. 116, 117). Thereupon, without hearing the case, the Court of Appeal on the 24th day of May, 1904, granted the motion to strike out, and on the same date, affirmed the decree below (Rec., pp. 119, 120) from which decree an appeal was taken to this Court (Rec., p. 120).

Assignment of Errors.

First. The Court of Appeals erred in entertaining the appeal of the appellee from the decree passed by the Supreme Court of the District of Columbia, on November 6th, 1901 (Rec., p. 110).

Second. The Court of Appeals erred in passing the decree of February 20th, 1903, whereby the decree of the Supreme Court of the District of Columbia (Rec., p. 110) was reversed, and the cause remanded for further proceeding (Rec., pp. 111-112).

Third. The Supreme Court of the District of Columbia erred in dismissing the bill and passing the decree of January 6th, 1904 (Rec., p. 113).

Fourth. The Court of Appeals erred in passing the decree affirming the decree of the Supreme Court of the District of Columbia, passed January 6th, 1904 (Rec., p. 113), and in not reversing the said decree; and further erred in striking out part of said record by its decree on motion of the appellee (Rec., pp. 119-120).

ARGUMENT.

The Court of Appeals had no jurisdiction to entertain the appeal of the appellee, John E. Roller, from the decree of the Supreme Court of the District of Columbia, passed November 6th, 1901 (Rec., pp. 110-111).

It will be seen by the record that the original decree in the case was passed May 5th, 1896, dismissing the bill as to Roller. And on May 6th, of the same year, a decree was passed for partition of the property.

That on June 30th, 1896, a final decree was passed confirming the partition made by commissioners appointed and appointing a trustee to sell the remainder of the property (Rec., p. 98.) The decree of May 5th and June 30th, 1896, the first dismissing the bill as to Roller and the second confirming the commissioner's report in partition, were final.

It cannot be said that a decree of May 5th, 1896, dismissing the bill as to Roller was not a final decree as to him. He appealed from said decree on May 21st, 1896, (Rec., p. 92,) at which time the decree confirming the commissioners' report in partition had not been passed, (see decree of June 30th, 1896, Rec., p. 98). Roller's appeal was dismissed on October 24th, 1898, (Rec. p. 99). At the time the order dismissing the appeal was passed Roller had not prosecuted his appeal, although more than two years had elapsed and the rules of practice of the Court of Appeals only allowed him forty days in which to complete his appeal. At the time he took the appeal from the order denying his second motion to intervene (Rec., p. 110,) five years had elapsed.

There need be no authorities cited to this Court to sus-

tain the proposition that a decree dismissing one party from a suit is a final decree.

As to the decree of June 30th, 1896, confirming the report of the commissioners in partition and whether or not the same was final, see—

Washington, etc., vs. Mayor, 2 Wall., 575.
Dean vs. Nelson, 7 Wall., 342.
Bk. of Louisburg vs. Sheffey, 140 U. S., 445.
Willard vs. Willard, 145 U. S., 116.

NOTE.—The last-named case was an appeal from the Supreme Court of the District of Columbia, in general term, ordering partition of by sale of certain real estate situate in the District of Columbia.

See also Mackall vs. Welloby, 6thA pp. D. C., 125; and same case in 167 U. S., 681.
See also St. Louis Etc., Co. vs. Southern Express Co., 108 U. S., 24.
Winthrop vs. Meeker, 109 U. S., 180.
Exparte Norton, 108 U. S., 237.

And on this subject it may be well to state that the decree of June 30th, confirming the commissioner's report (Rec., p. 98) was made final by the Act of Maryland, 1785, Chapter 73, Sec. 13; which provides that such decree shall pass title and have the effect of a deed. (See Abbert's Compilation, p. 85, Sec. 34.)

The cases cited in the opinion by the Court of Appeals to the contrary, namely, Perkins vs. Fourniquet, 6 How., 206; Fourniquet vs. Ewing, 16 How., 82, and Iowa vs. Illinois, 151 U. S., 238, do not seem to militate against the proposition that the decree of June 30, 1896, in this

case was final. In the first case the holding of the Court was merely that a reference to a master subject to the approval by the Court of the master's report was not final, whereas in this case the report of the commissioners was actually made and ratified. In the second case the order was that the complainants were entitled to two-sevenths of certain property and a reference was made to a master to take and report an account of it, reserving all other matters in controversy, and this was held not final, whereas in the present case the commissioners authorized to make a division reported, and their report was ratified and adopted. And in the third case, the decree appealed from directed a report of commissioners, who reported only as to a portion of the subject-matter referred, and it was held that a confirmation of this report as to such portion was not final, inasmuch as it did not cover the whole subject; whereas in the case at bar the report of the commissioners, which was approved, did cover the whole subject. In the case at bar, not only were commissioners appointed to make a division, but they actually made and reported such division, and their report was finally ratified, namely, on June 30, 1896. It would seem clear that this was a final decree, and that as the time for appeal from that decree had long since expired before the filing of the petition, which is the subject of present consideration, the appellee could not possibly have any standing in court.

It cannot be said that the Supreme Court of the District of Columbia did not have jurisdiction to entertain the suit for partitions. The title of the plaintiffs to the bill were fully admitted by Roller's answer and his only claim of title was under a mere void tax deed,

which the Court found to be the case. He had denied his tax title distinctly in a former proceeding (see Rec., pp. 67 and 68) where the case of Carruthers vs. Smith, Law No. 27147 of the Supreme Court of the District of Columbia, was pending involving title to these same lots. In answering the writ of *scire facias* the said Roller used the following words:

> "*That, moreover, the legal title to said lots never was in the said Irving, nor in the persons in whose names the lots were assessed and sold for taxes, but was in the heirs-at-law of Thomas Beall, deceased, who was the survivor of himself and John Mackall, the trustees of the original proprietors of the District of Columbia, and these heirs have conveyed said title to this respondent by deed dated the first day of March, 1889, and recorded in the land records of this District, in Liber No. 1548, folio 481, et seq.*
>
> "Having answered, he prays to be hence dismissed with his costs.
>
> JOHN E. ROLLER."

It is well settled, says the Court of Appeals in citing many authorities, that the mere averment of adverse title by the defendant in a partition suit is not sufficient to suspend the proceeding, but it was within the power of the Court to ascertain if the existing outstanding legal title claimed was sufficient to constitute a sufficient defense in an action of ejectment.

That is just what the Court that passed the decree of June 30th, did in this case. All of the parties were before the Court and not only had the title of the tenants in common been established, but Roller by his own answer and own statements had admitted that they had title, he

had none. See Roller's testimony as to his title (Rec., p. 39; Rec., p. 61). The defendants were in actual possession of the property; see Walker's deposition (Rec., p. 16, see p. 22). Such being the case, the Court of Appeals had no jurisdiction whatever to entertain the appeal of John E. Roller from the decree of November 6th, 1901, or the former decrees passed in the case.

The second attempt of Roller to get into the case was nothing more than a motion for rehearing, which was not subject to an appeal. Investment Co. vs. Sydnor, 19th App., D. C., 87. This ruling of the Court of Appeals is wholly inconsistant with any other case it has passed upon.

District vs. Humphries, 11th App., D. C., 68.
Chisholm vs. Cissell, 12th App., D. C., 180.

The order of May 5th, 1896, dismissing Roller was either final or interlocutory. If final, certainly it was incumbent upon him to complete his appeal in forty days. If not final, it was necessary to ask for the allowance of a special appeal. The Court of Appeals in the case of National Marble Co. vs. Railroad Co., 8th Appeals, D. C., 487, held that an application for the allowance of an appeal, made thirty days after the interlocutory order was passed came too late.

If the decree dismissing the bill as to John E. Roller on June 5th, 1896 (Rec., p. 99), was not final, how can it be said, that the decree of November 6th, 1901, dismissing his second petition for intervention (Rec., p. 110), was final? Certainly if he could not appeal from the first decree, for want of finality, he could not appeal from the second, for the same reason.

How can it be said that a person claiming an entire title to real estate and having no interest in the proceedings, he not being a party thereto and not being affected thereby, can intervene in a suit and stop other persons from litigating and setting their disputes about the same. If Roller was not in possession, his remedy was clearly at law, by action of ejectment. If he was in possession, his remedy was, if he had title, by adverse possession, (*which he did not claim*), by bill to quiet title.

It is a well settled principle of law that no man has a right to intervene in a case which does not concern him, and which could not affect him in any way by any decree passed in the case. Is a denial of the right to intervene in such a case appealable?

We contend that the merits of the case was closed when Roller was dismissed in 1896.

The Court's attention is specially called to the fact that Roller had admitted the title of the parties. Besides his tax title he set up title under deed from Thoma Beale, trustee to whom the legal title were conveyed by the original proprietors to lay off the City of Washington, but he afterwards abandoned that claim altogether. See stipulation of Roller (Rec., p. 29).

The appellee Roller, having taken an appeal from the decree dismissing the bill as to him and having failed to prosecute same and such appeal being dismissed (Rec., p. 99), he was out of Court for all purposes and had no right to intervene a second time in the case. It may be said on behalf of the appellee that the decree passed upon Roller's first demurrer, dismissing the first bill as to him, was a bar to any other suit (Rec., p. 79). But it will be plainly seen by said decree that the bill was only dismissed as to said Roller; the Court evidently intending

that the remaining parties should continue, if they should so desire.

Instead of doing so however, they saw fit to enter a voluntary dismissal of that bill (Rec., p, 78), and began a new proceeding (Rec., p. 2).

The tax deed set up by Roller was absolutely void, and he did not show any title by adverse possession ; therefore the Supreme Court of the District of Columbia, Mr. Justice Cox, would have been justified in passing a final decree against him, declaring the tax deed, under which he claimed (Rec., p. 30), void and removing the same as a cloud upon the title of the other parties.

King *vs.* D. C., McA. and Mackey, 36.
Wash. *vs.* Pratt, 8 Wheat., 681.
French *vs.* Edwards, 13 Wall., 506.

His claim as to loss of records was not proven, and even if it had been it would have not have changed the situation.

Mason *vs.* Fearson, 9 How., 248.
Walker *vs.* D, C., 6 Mackey, 352.

The said tax deed was void upon its face and without proof of adverse possession for the full period of twenty years, as then required, it was not evidence of any title whatever, and could not be admitted for any purpose.

Sharon *vs.* Tucker, 144 U. S., 533.

It may be well to state that the reason why the deed is void on its face is : 1st, because the tax collector instead of selling each lot separately, as the law required, sold them in a lot.

Washington *vs.* Pratt, 8 Wheat., 681.

And second, because the tax collector did not certify the record of the sale to the recorder of deeds, as required by law.

King vs. District of Columbia, 2 McA. and M., 36.
Keefe vs. Bramhall, 3 Mackey, D. C., 551.
Reade vs. Anderson, 13 App., D. C., 30.

The decree of the Court of Appeals affirming the decree below whereby the bill of complaint was dismissed, should be reversed and the case remanded to the Supreme Court of the District of Columbia, with directions to vacate the decree of January 6th, 1904 (Rec., p. 113).

Respectfully submitted,

Leo Simmons,

Attorney for Appellants.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.
No. 72.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER,
Appellants

vs.

JOHN E. ROLLER,
Intervenor.

Opinion of Court of Appeals, 19 App. D. C., Page 540. Filed in behalf of Appellants.

LEO SIMMONS,
Attorney for Appellants.

MILANS, LAW PRINTER, 615 E STREET, N. W., WASHINGTON, D. C.

ROLLER *v.* CLARK, 19 App. D. C. p. 540.

The Court in the opinion stated the case as follows:

The appellant, John E. Roller, appeals from a decree passed November 6, 1901, dismissing his bill of intervention in a partition suit pending in the Supreme Court of the District.

It appears from the record that on or about January 14, 1893, Allen C. Clark and wife began a suit (No. 14,468) for partition of lots 8, 9, and 10 in square 1028. They claimed title to a portion of the same under mesne conveyances from Abraham Young, who was seized and possessed of the whole in the year 1800. There were many defendants to the bill, including persons claiming in part also under said Young, and the heirs at law of one James Ward Scott, in whom title to one-fifth is alleged. John E. Roller was also made a party defendant with the allegation that he claimed title to the whole under a pretended sale for taxes made in 1852. It was alleged that the tax sale and all proceedings therein were null and void because the requirements of the law were not complied with; and it was specially charged that there was a failure to transmit to the Clerk of the Circuit Court of the District a report in writing duly certified, &c., of said sale; wherefore said claim of title is a cloud upon the true title and ought to be removed, and decree therefor was prayed.

John E. Roller demurred to this bill on two grounds: first, that the bill could not be maintained as against him until title shall have first been asserted in a court of law. Second, that the complainants are barred by laches.

This demurrer was sustained on June 17, 1893, and the bill dismissed as to said Roller. Complainants subsequently ordered their bill to be dismissed, having filed a new suit, numbered 15,141.

This new bill was filed November 24, 1893, and contained the same allegations substantially as the former, save that John E. Roller was not made a party and no allegation concerning his tax title was made. On January 25, 1894, Roller obtained leave to intervene and in accordance therewith filed an answer on February 13, 1894.

In this answer he alleged a tax sale under which he claimed as made in 1850, the payment of all taxes since that date by him and those under whom he claims, and the exercise of rights of ownership and possession for half a century, during which period witnesses have died and records have been lost, so that it would be impossible to establish all the facts thereof with certainty. He further charged unexplained laches on the part of the complainant and those under whom they claimed, and finally set up the proceedings in cause No. 14,468, and the decree therein rendered as a bar to complainant's rights.

Complainants filed a supplemental bill repeating practically the allegations of the bill in No. 14,468 concerning the legality of the said Roller's tax title. Roller pleaded the aforesaid decree specially in reply to the foregoing.

Testimony was then taken upon the issue joined. Roller, on his own behalf, testified to his purchase of the then vacant lots, for a valuable consideration in the fall of 1887; the payment of all taxes assessed against the same since his said purchase; that he caused the erection of a fence completely enclosing the premises, shortly

after his purchase, and then leased the same to one Myers as a horse lot, in consideration of his promise to keep the fence in repair; that late in 1892, he discovered that some one had broken a part of the fence and dumped quantities of earth upon the lots which were low; that some one else—supposed to be John H. Walter—had put up a fence, whilst the litigation was pending; and that he (Roller) was certainly in actual possession when cause No. 14,468 was instituted.

William Myers testifies as follows: That the lots were fenced in 1887; that witness obtained the use of them from Roller for keeping his horses thereon upon condition of keeping the fence in repair which he did until during the year 1892; that in 1892 some contractors for adjacent excavations broke the fence and dumped some earth upon the lots, and the fencing was then gradually carried away and burned; that in the fall of 1892 a man by the name of Davis, who owned or claimed a small lot within the enclosure, fenced it and made some repairs to the general fencing; that but little of the fence remains now, the same having been from time to time taken away by parties unknown. The tax receipts were produced showing payment by Barry and his heirs from and after the alleged tax sale and title issued to him thereunder in 1850 or 1852. Other evidence was introduced respecting the condition of the lots and their value at an early day, their gradual coming into value with the recent growth of the city, and also touching the existence of certain ancient records of the Clerk's Office of the old Circuit Court of the District; this is of no practical importance in our view of the case.

On May 5, 1896, the following decree was passed: This

cause coming on for final hearing on the pleadings and evidence and having been heard and considered, and the Court being of opinion that it has no jurisdiction to entertain this suit, as against the defendant, John E. Roller, that the bill of complaint is multifarious as regards said defendant, and that the complainants are barred by their own laches from any equitable relief against said defendant, it is hereby, this 5th day of May, 1896, ordered, adjudged, and decreed that the bill of complaint be dismissed as against said defendant Roller; but it further appearing that said Roller was admitted as a defendant in this cause upon his own application and without the consent of the complainants, it is further decreed that the said dismissal be without costs to the said defendant.

This cause is reserved for further proceedings as between the other parties to the cause.

On May 6, 1896, a decree was passed as between the remaining parties granting the prayer for partition as prayed.

On June 30, 1896, the Commissioners' report was confirmed, and Leo Simmons, Esq., was appointed trustee to make sale of certain interest, the same being incapable of partition in kind.

No action seems to have been taken under this decree until advertisement made in July, 1901, whereupon (July 26) John E. Roller under leave previously obtained, filed a partition in intervention. Herein he alleged title in fee simple in the premises in himself since 1886, and the payment of all taxes and the exercise of ownership and possession thereafter. He also alleged the proceedings and decree in cause No. 14,468, and the proceedings

and decree thereafter in No. 15,141—the present case, and charged that when the decrees of partition and sale aforesaid were made, he was in the sole and exclusive possession of the property, that the orders for partition and sale were passed without jurisdiction and cast a cloud upon his title, etc. He prayed that the sale be stayed until final hearing and for a decree vacating all proceedings in the said cause since the decree May 5, 1896, and for general relief. The complainants replied denying title in Roller, denying his possession and alleging the actual possession in Bartow L. Walker one of the defendants, when the suit was begun and is now in Leo Simmons, trustee. Leo Simons trustee made a reply also which, however, set up nothing new, save that sale had not been made under the decree of June 30, 1896, because of prevailing conditions of the market rendering the same undesirable, etc.

On hearing, September 9, 1901, Roller's pettition was denied and the same dismissed with costs, and the order staying the sale by Simmons, as trustee was vacated. From this decree Roller has appealed.

Mr. O. B. Roller and *Mr. D. S. Mackall* for the appellant.

Mr. Leo Simmons for the appellees.

Mr. Justice SHEPARD delivered the opinion of the Court:

The argument has taken a very wide range which, in our veiw of the manner in which the case must be disposed of for the present at least, there is no occasion to follow.

Chief among the questions that have been discussed and will be passed upon are the following:

1. To what extent, if any, the tax title under which the appellant claims may be affected by alleged irregularities in the proceedings culminating therein? 2. What effect, if any, have either the decree rendered in No. 14,468, or the earlier decree in the present proceedings, on the first intervention of appellant, *as res adjudicata* in respect of his title as against the appellees?

The titles under which the appellant and the appellees respectively, claim are strictly legal titles, and there is nothing in the allegations of the bill that can make them cognizable in equity. The conflict between them can only be adjudicated in an action at law, wherein may be completely determined, not only the question of the validity of the tax sale and title thereunder, but also the effect of the former adjudications, whatever that may be.

It is not alleged in the bill that the complainants were in the actual possession of the lands, or had even a constructive possession; and it is not yet a settled question, in this district, that, without actual possession the court has jurisdiction to entertain a bill for partition at all. *Williams* v. *Payne*, 169 U. S. 55, 80; S. C. 7 App. D. C. 116, 131.

However, the difficulty of the situation extends far beyond this. The first bill filed—14,468—not only failed to allege actual possession, or an undisputed title in those among whom partition was sought, but expressly averred an adverse legal title in the appellant, John E. Roller, under a tax sale which it sought to annul for irregularities.

The decree sustaining the demurrer of Roller to that bill does not show the ground of dismissal. But considering the first ground of the demurrer it is not unreasonable to suppose that the court regarded the settlement of that title by action at law, as a necessary prerequsite to the partition sought as between the remaining parties to the suit. In the light of the facts as they then appeared, a dismissal could be upheld on that ground as we shall see later.

Regarding the bill, in so far as it was aimed at the defendant, Roller, as one to remove cloud from title, the dismissal might be upheld upon the ground of unexplained laches, and the failure to allege possession in the complainants. Looking at the double purpose of the bill, partition as regards one set of defendants, and removal of cloud from title as regards another wholly disconnected from them, it was clearly bad for multifariousness. *Fields* v. *Gwynn*, 19 App. D. C. 99.

But passing to the bill with which the present suit was begun Roller, as we have seen, was not made a party defendant, but came by partition in intervention, and again set up his legal title and possession thereunder. No attempt was made to controvert his proof of actual possession under claim of a legal title which has been heretofore referred to. Upon this pleading and proof, the bill was again dismissed as to Roller, the decree reciting as ground therefor, "that the complainants are barred by their own laches from any equitable relief against said defendant." Here again, treating the supplemental bill in reply to Roller's answer as one to remove cloud from title, the dismissal was clearly right.

The decree, however, should have gone farther, and

that part of it retaining the bill as between the remaining parties for partition, should have recited that it was to be retained, with suspension of further proceedings, for some reasonable time within which the complainants might establish their title at law.

"While the jurisdiction of the Court of Equity to decree partition, or sale for parition, is undoubted in cases where there is no serious question of the legal title as between the parties, it is equally well settled that the Court does not sustain a bill for partition unless the legal title be clear; and where the legal title is disputed the Court will retain the bill to give the plaintiff an opportunity to establish his title at law. This is the well established practice. *Wilkin* v. *Wilkin*, 1st John Ch., 111; *Phelps* v. *Green*, 3d John Ch., 302, 305; *Coxe* v. *Smith*, 4th John Ch., 271, 276." *Mudd* v. *Grinder*, 1 App. D. C., 418, 419 and 420; *Walker* v. *Lyon*, 6 App. D. C., 484; *Williams* v. *Payne*, 7 App. D. C., 116, 131; *Smith* v. *Butler*, 15 App. D. C., 345, 353, 355. See also *Moore* v. *Shannon*, 6 Mackey, 157; *Agar* v. *Fairfax*, 2d L. C. Equity 4th Ed., notes p. 900 *et seq.*; 3d Pom. Eq. Jur. §1388; 17th A. & E. Enc. L., p. 709.

In *Smith* v. *Butler*, *supra*, whilst maintaining the general doctrine above stated, it was also held that the mere averment of an adverse title by a defendant in a partition suit was not sufficient of itself to require suspension of the proceedings; but that it was within the power of the Court, if not his duty to ascertain whether in fact there exists an outstanding legal title reasonably sufficient on its face to constitute a ground of defense in an action of ejectment. That condition was unquestionably fulfilled in the case at bar by proof stronger even than the allegations of the intervenor's answer.

It is no doubt largely the fault of the appellant that the decree did not take the form indicated above as correct. He apparently made no such request or suggestion; but then, as now, sought to have his own title established as against that of the complainants in the bill notwithstanding the proof of possession for a term of years under the claim of a legal title by the intervenor he had no sooner passed out of the case under the decree mentioned than the complainants obtained the order of partition that was speedily followed by that for sale and distribution of its proceeds. Nearly five years later, when the trustee for the first time advertised the sale the intervenor again appeared by petition alleging the validity of his title as finally established by the former adjudications in his favor, and, among other things, prayed that all orders and decrees made in the said cause after dismissing him therefrom on May 5, 1896, be vacated.

Whether, under the conditions stated, the court had jurisdiction to pass these orders at all, or if so, whether they should not now be vacated, are questions that we shall not undertake to answer. The first presents a serious question that was not noticed on the argument and the second is of no practical importance.

Its attention having been again called to the condition of the title the proper course to be pursued was to suspend all proceedings and give the complainants reasonable time to establish a title at law if requested; or else to dismiss their bill without prejudice, leaving all parties to pursue such remedies for the protection of their interests as they might be advised.

One other question remains to be considered. Assuming that the court had jurisdiction to render the decrees

for partition and sale, and conceding for the purposes of the argument that they may have been erroneous, it is contended, on behalf of the appellees, that together, they constitute a final decree in the cause, which, after the term, passed beyond the power of the court to vacate. This contention is not well founded for reasons plainly stated in the following decisions of the Supreme Court of the United States: *Perkins* v. *Fourniquet*, 6 How. 206, 208; *Fourniquet* v. *Perkins*, 16 How. 82, 86; *Iowa* v. *Ill.*, 151 U. S. 238, 241.

The decision of this Court relied on by the appellees—*Schwarz* v. *Costello*, 11 App., D. C., 553—presents an entirely different state of facts, and does not conflict in the slightest degree, with the cases above cited.

For the reasons given, we are of the opinion that the decree appealed from should be reversed with costs, and the cause should be remanded for further proceedings not inconsistent with this opinion.

It is so ordered. *Reversed.*

A motion for a rehearing was filed April 15, 1902, on behalf of the appellees, by *Mr. Henry E. Davis*, *Mr. Leo Simmons*, *Messrs. Hamilton & Colbert*, and *Mr. John Ridout.*

In support of their contention that the decree of the lower court, passed June 30, 1896, was a final decree and therefore not appealable, they cited the following cases: *Washington, etc., Company* v. *Mayor*, 7 Wall. 575; *Dean* v. *Nelson*, 7 Wall. 342; *Bank of Lewisburg* v. *Sheffey*, 140 U. S. 445; *Willard* v. *Willard*, 145 U. S. 116; *St. Louis etc., Co.* v. *Southern Express Co.*, 108 U. S. 24; *Winthrop Co.* v. *Meeker*, 109 U. S. 180; and *Ex parte Noughton*, 108 U. S. 237.

The motion for a rehearing was denied on May 6, 1902, Mr. Justice SHEPARD delivering the opinion of the Court:

Accompanying the motion for rehearing is a stipulation of the parties with an exhibit supplying an omission of the record upon which this case was heard and determined.

As both parties have agreed that the ommission was inadvertent and seem to regard the additional matter as material to all the interests involved, it has been accepted and made a part of the record for purposes of consideration and further appeal if taken. We must add, however, that the practice of suggesting defects in the transcript of the proceedings below, or in the printed record for hearing in this court, after the case shall have been decided, is not to be considered as approved by the action now taken.

It appears from this stipulation that, on May 21, 1896, John E. Roller entered an appeal from the decrees that had been entered in the cause, that he failed to perfect his appeal, and that the same was formally entered in the court below on October 18, 1898, as dismissed for want of prosecution.

The application to the clerk to enter the notice of appeal, does not specify what decrees he appealed from; but it is assumed that he meant to appeal from the two decrees that had then been entered, namely, on May 5, 1896, sustaining his demurrer and dismissing the bill as to him, and on May 6, ordering partition between the remaining parties. This action was immaterial as well as ineffectual.

Roller could not be heard on appeal from a decree in his own favor, sustaining his demurrer and dismissing the bill as to him. As a matter of fact, he relied upon this decree as one of the grounds of his second intervention, and has relied upon it throughout the hearing on appeal, as being a final adjudication of the title in his favor as against the claims of the appellees.

He was out of the case when the second decree was passed, and remained a stranger to the record until his re-entry by petition in intervention on July 26, 1901.

Whatever opinion Roller may then have had, or may now have of the nature and effect of the decree sustaining his demurrer, as indicated by the persistence of his argument throughout, is immaterial. His contentions founded thereon, as well as on the decree in the first of the cases—No. 14,468—were passed by for reasons that have been given in the opinion heretofore delivered, and which require no further elaboration.

That the main question upon which the case was made to turn in the opinion, was not argued on the hearing is due to the persistence of the appellant, Roller, in his reliance upon the decree as a final and complete adjudication of title in his favor. It is true that he made the point as one of the grounds of his demurrer to the bill as filed in No. 14,468, but it was thereafter abandoned in favor of the preferred contention. It was not to be expected that the appellees would themselves raise the question. But it was apparrent on the face of the record and, being jurisdictional in its nature, forced itself into consideration.

That, under the conditions presented by the pleadings and evidence at the time, the decree of partition was, at

least premature, is virtually conceded by the appellees. They do not deny the doctrine of the opinion, but now, as at the hearing, their contention is that the decree, whether erroneous or not, became a finality on the expiration of the term at which it was rendered. And it is apparent that the addition sought to be made to the record is for the purpose of strengthening the foundations of that contention.

The question whether that decree was final in the sense that it passed beyond the power of the court rendering it to recall after the expiration of the term was argued on the hearing and determined after full consideration and examination of the authorities bearing upon it.

We have found nothing in the argument now before us to require a change of the views expressed in our former opinion.

The additional decisions cited do not determine the point. They involve the finality of different decrees, as regards the rights of appeal therefrom, and are reviewed in a later case (*McGourkey* v. *Railroad Co.*, 146 U. S. 536), which was carefully examined before reaching our former conclusion.

The motion for rehearing is *denied with costs.*

The appellee admits that the parties to the cause, other than himself, have a straight record title. (Rec., 29.)

He has made oath that the tax title, under which he claims, is void. (Rec., pp. 67, 68.)

He has testified and openly admitted that his possession of the property was only of short duration, and not sufficient to constitute title by adverse possession. (See his evidence, Rec., p. 39 and 61.)

Such being the case, even if the case was here on its merit, by what rule of law can this opinion or the appellee's contentions be upheld.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

Nos. 72 and 451.

ALLEN C. CLARK, SARAH P. CLARK, HIS WIFE, AND BARTOW L. WALKER,

Appellants

vs.

JOHN E. ROLLER,

Intervenor.

JOHN E. ROLLER, *Intervenor,*

Appellant

vs.

ALLEN C. CLARK, SARAH P. CLARK, AND BARTOW L. WALKER.

MOTION FOR REHEARING OR FURTHER MODIFICATION OF DECREE.

LEO SIMMONS,
Attorney for Appellant.

MILLER, LAW PRINTER, 512 E STREET, N. W., WASHINGTON, D. C.

IN THE

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JOHN E. ROLLER, *Intervenor*,
Appellant

vs.

ALLEN C. CLARK, SARAH P. CLARK, AND BARTOW L. WALKER.

Now comes the appellants and move the court to further modify the decree appealed from in this case, so that the trial court may pass upon the title of the appellee, Roller, and that of the appellants and other ten-

ants in common; or if the court is of the opinion that this should not be done, to further modify the decree so that issues may be framed, by the trial court, and sent to a jury for trial, in order to avoid beginning a new proceeding, and, if necessary, to grant a rehearing for that purpose.

ARGUMENT IN SUPPORT OF MOTION.

Roller is not a resident of the District of Columbia, and service cannot be had on him in an action of ejectment; see his own statement as to this fact (Rec., p. 8).

It appears from the record (Rec., p. 8) that Roller was allowed to intervene upon his own petition; that he claimed the sole ownership of the property (Rec., p. 8 and 9); that he afterwards filed an answer to the bill of complaint and asked the court to "Quiet him in his title and ownership of the property, and to enjoin the complainants and all parties to this suit from in any way claiming title to the premises, etc."

Clearly this was a cross petition in its nature, such as would be set forth in a cross bill. He never has intimated in any of his pleadings a desire that the case be tried by an action of ejectment. The Court of Appeals so found. (See opinion 19, App. D. C.)

He having entered into the case and prayed specific relief, the complainants and the other tenants in common had a right to assume that the whole question of title would be litigated and settled in the suit.

Such being the case, they proceeded to prove their title in a manner satisfactorily, not only to the court, but to Roller himself; for it will be seen by Roller's stipulation (Rec., p. 29) that the whole title of the appellants, which

includes proof of heirship, tracing title into the parties, was fully proven.

It further appears from Roller's second petition to intervene (Rec., p. 100; see p. 102) he asked for leave to introduce further testimony, etc. His whole intention and whole aim seems to be to litigate his title and that the whole matter should be settled in the suit pending.

The decree of the late Mr. Justice Cox, holding that the court did not have jurisdiction over Roller was necessarily erroneous, and inasmuch as this court holds that none of the decrees were final, there seems to be no reason why the whole question should not be litigated and settled in this case without requiring the appellants to resort to an action of ejectment.

Undoubtedly, if the court had jurisdiction at all over Roller, that is to say, if it could give him any relief, it would have the right to pass a decree adverse to him. It certainly cannot be said that the court has jurisdiction to pass a decree in favor of a person and yet not have jurisdiction to pass one adverse. This would be tantemount to tying the hand of one party and giving the other a club, so to speak.

For certainly as Roller brought himself into the case as a litigant, he placed himself in position to have a decree passed against him, as well as to have one passed in his favor.

Take the position this decree will leave the parties; Roller is a non-resident of the District of Columbia, as before stated (see his petition setting forth that he is a citizen of Virginia (Rec., p. 8). The evidence (see Walker's and Roller's testimony) clearly shows that the parties claiming as tenants in common were in possession of the property. Suppose, by chance, Roller could not be found

in the District, it would be impossible to bring an action of ejectment against him, even as a claimant, because service by publication could not be had in such a case. Moreover, Roller is and was at the begining of this suit, the attorney and legal adviser of the heirs of James Ward Scott, parties to this suit, who owned one-fifth of the record title (see Roller's own statement to this effect (Rec., p. 40); certainly he would prevent them from suing him.

It seems that the court has overlooked these facts, which clearly show that the only remedy the appellants had in this case was to proceed as they did.

If the court's opinion, that the plaintiffs should settle their title at law before they can have partition, is to stand, it seems that there is no good reason why the complainants and the other tenants in common should be required to again prove their record title in an action of ejectment, even if it is possible to get service on an adverse party, against whom they have already proved their title, not only to the satisfaction of the court, but to such party himself.

It must appear to the court that the proof of heirship in this case was not only troublesome, but an expensive undertaking. Roller had full opportunity to cross-examine witnesses and object to the evidence. He asked to have the whole question of title duly adjusted and settled in the equity suit, and why should more be required?

This seems a most remarkable case.

A non-resident party, claiming title under a deed void upon its face, representing parties owning one-fifth of an adverse title, comes into a suit for partition between tenants in common, holding a record title (he admits this, see Roller's answer and stipulation) requesting that he be allowed to litigate his title and have the question settled.

The court holds that the tenants in common who claim the record title shall not proceed until they begin an action of ejectment against this a non-resident, and attorney for some of them, and establish their title at law.

Suppose we reverse the situation. Suppose Roller claimed an undivided interest under the tax deed and begun suit for partition against his co-tenants, and supposing parties claimed the record title prayed leave to intervene in the suit, as Roller did in this case, would the court have entertained their petition at all.

What becomes of the well-known principle that equity will not entertain a bill in favor of a party who has a plain remedy at law, if such is the case?

The question of jurisdiction over Roller, if he had any right in the case at all cannot be doubted. For if he had any right in the case and the court took jurisdiction over him, which was necessary in order to grant him any relief at all, it necessarily had jurisdiction to grant a decree against him. The rule of laches, as I understand, is usually applied to a complainant who has slept upon his rights, but it cannot and should never be applied when a person is defending.

I respectfully submit to the court that this decree should be so modified as to require the trial court to settle the rights of the parties. Inasmuch as the court is of the opinion that Roller has a standing in the case, if he has a title he should have such decree as he prays, if not, it should be so decided.

If the court thinks this should not be, and that the parties should settle their title at law, then I respectfully submit that no new action should be required. The trial court should be directed to frame issues and send them to a jury, which is often the case where facts have to be de-

cided in order to aid the court in coming to a proper conclusion. In as much as the court has held that he had a right to intervene in the case and was a proper party, that being settled, the rule that the Equity Court could frame issues to try the questions of facts should necessarily follow. Therefore, I respectfully submit to the court that the decree should be modified so as to allow the court, that tried the case, to pass upon the whole question of title. If the court is of the opinion that this is not proper, then the decree should be modified so as to direct the Equity Court to frame issues and send them to a jury for trial, with the right of the complainants to use the evidence already taken in the case.

Respectfully submitted,

LEO SIMMONS,
Attorney for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905

No. 72

ALLEN C. CLARK AND WIFE, AND BARTOW L. WALKER,
Appellants
v.
JOHN E. ROLLER,
Intervenor, Appellee
} *Upon Original Appeal.*

and

No. 451

JOHN E. ROLLER,
Intervenor, Appellant
v.
ALLEN C. CLARK AND OTHERS,
Appellees
} *Upon a Cross Appeal.*

From the Court of Appeals of the District of Columbia.

Brief and Argument for John E. Roller, Intervenor Appellee in First Case and Appellant in Second Case.

JOHN E. ROLLER,
O. B. ROLLER,
Attorneys for said John E. Roller.

Virginia Printing Corporation, Busy Printers

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Brief and Argument for John E. Roller, Intervenor Appellee in First Case and Appellant in Second Case.

FACTS OF THE CASE.

The controversy in this cause, is over original lots numbered eight, (8), nine, (9), and ten, (10), in square No. 1028, in the city of Washington, in the District of Columbia.

The Appellee, John E. Roller, who is appellant in the cross appeal, insists that he is the sole and exclusive owner in fee simple of said lots, and shows that he is in the sole

and exclusive possession of the same, that he acquired the property for value, and without notice of any claims thereto, on the part of any other person whatsoever, about the year 1886, that he has ever since, exercised all the rights of ownership in respect to said property, and has paid all the taxes and assessments against the same, it having been assessed in his name.

It appears that the title under which the said John E. Roller holds the property was originally a tax title, by virtue of which the property in controversy, after having been delinquent from the years 1824, down to the year 1846, was sold after due advertisement thereof, for said delinquent taxes, on the 8th day of December, 1847, to one Richard Barry, to whom, after the expiration of two years, from the date of said sale, the said property not having been redeemed as provided by law, the same was conveyed, by the corporation of the city of Washington, by its mayor, the Honorable Walter Lenox. It further appears, that the said Richard Barry and his widow and heirs, claiming under said tax title, held said property down to the year 1875, when they conveyed it to one William H. Triplett, having paid the taxes on said property during all of the said years, for which they produced the original tax receipts, and that subsequently the said William H. Triplett conveyed the said property to one John S. Irvin, who in turn conveyed the same, to one John Ambler Smith, who again in turn conveyed the same to the appellee, John E. Roller, and that the said Roller, and those under whom he claims, have paid all the taxes, general and special, assessed against the property, and exercised acts of ownership and possession over said premises, for nearly sixty years. It further appears, that the appellee, John E. Roller, believing that the conveyances made by the original proprietors to John M. Gantt and Thomas Beall of George, vested the legal title to all lands in the District of Columbia, in them, as trustees:

First, That they should convey to the Commissioners of the District of Columbia, all lots that were chosen by the Government, or wanted by the Government, for its purposes, either for reservations, or for the buildings of the capitol, the President's house, or any other public building, or for public squares, for the use of the city, or for streets and alleys throughout the city, and:

Second, That they should convey back to the original proprietors, after the Government had taken what it wanted, the residue of the property conveyed to them by the original proprietors as aforesaid; had obtained a conveyance to him from the heirs of Thomas Beall, of George, the survivor of said trustees, of the legal title.

On the other hand, the appellant, Allen C. Clark, claims an interest in said property as alienee of some of the heirs of John Young; and his wife, Sarah P. Clark, was joined with him in the cause below in her right as his wife; while the other appellant, Bartow L. Walker, is the alienee of other heirs and devisees, and their alienees, of the alleged title of the said John Young, it being alleged by them, that one Abraham Young, of the District of Columbia, died about the year 1800, intestate, seized and possessed of the lots in controversy; that he left surviving him as his only heirs at law, four sons, John, Samuel W. Charles, and Richard Young, and two daughters, namely, Susanna Young, who intermarried with John A. Sommers, and Elizabeth Young, who intermarried with one Mahlon Roach; that upon the death of Abraham Young, his real estate in the District of Columbia was partitioned among his children, and these lots, eight, (8), nine, (9) and ten, (10), square 1028, were allotted to his son John Young; that John Young died in the year 1823, unmarried and intestate, leaving as his only heirs at law, his brothers and sisters.

The record shows also that in January, 1893, the said Allen C. Clark, with whom was joined his wife, Sarah P.

Clark, instituted their suit in chancery in the Supreme Court of the District of Columbia, Equity cause, No. 14,468, against numerous parties, heirs at law, of the said John Young, or claiming under said heirs at law, and against the appellant, John E. Roller, in which suit, a partition of said lots eight, (8), nine, (9), and ten, (10), square 1028, among those entitled thereto, was sought, and to that end, a sale was asked to be decreed and made, of said lots, and the money arising from said sale, divided among the parties, according to their respective interests; and as necessary also to that and, it was especially prayed, that the tax title of the defendant, John E. Roller, by virtue of the sale of said property in 1847, as delinquent for the non-payment of taxes, to Richard Barry, as has already been set forth, might be decreed to be null and void, and the conveyances in relation thereto, and in connection therewith delivered up for cancellation, and cancelled, upon the grounds set forth in said bill of complaint, the only ground specifically set forth, and relied upon, in said bill of complaint being the averment that the officer or officers of the said corporation of Washington, professing to sell said lot for taxes, had not within ten days, after the sale thereof, or at any time, transmitted to the clerk of the late circuit court for the District of Columbia, for the county of Washington, a report in writing, certified by the clerk or register of the said corporation, in manner and form as required by section 2, of the act of Congress, approved February the 20th, 1819, nor was such report, or any report in the premises, forthwith, or at any time, recorded by the said clerk, or anyone else, among the land records of said county of Washington. The true title to said lots being clouded by reason of the claim of the said John E. Roller under the tax sale and deeds aforesaid, the said complainants asked to have said sale decreed to be null and void, and said deeds delivered up for cancellation and cancelled and the said cloud to the title of said lots removed.

The defendant, John E. Roller, filed a demurrer to this bill upon the grounds, to wit: First, that the complainants should not be permitted to maintain their bill of complaint against him, until they should have first asserted a title to their undivided interest in said real estate, in a court of law; and, Second, that they should not be permitted to maintain it against him, because they and those under whom they claimed, had been guilty of such *laches*, in the assertion of their claims, as to preclude them from receiving the aid of a court of equity.

The cause was heard upon this demurrer, on the 17th day of June 1893, and the demurrer was sustained, and the bill dismissed as to the said John E. Roller, with costs.

Subsequently, on the 24th of November, 1893, the same complainants instituted their second suit in chancery, in the said Supreme Court of the District of Columbia, Equity cause No. 15,141, against the same parties who were before the court in the first named Equity cause, No. 14,468, or certain privies, to whom, some of the defendants in said cause, had conveyed their interests in said property, but without making the appellant, John E. Roller, a party thereto and expressly avoiding to do so. Whereupon the said Roller, appeared before the court, and upon his petition it was ordered, that he should be made a party defendant, in the new suit, the said order being made by the same judge, (Hagner,) who had sat in, and decided the first named cause, and the complainants having filed a supplemental and amended bill, in which they again averred, that the tax title under which the said John E. Roller claimed title to the property, was null and void, and prayed that the same might be so decreed, and that the conveyances in relation thereto and in connection threwith might be delivered up for cancellation and cancelled, and that the said John E. Roller, and all persons claiming under him, might be forever enjoined, from setting up any claim, under or by virtue, of the said

conveyances, or any of them, the said John E. Roller, appeared to the said original and amended and supplemental bills of complaint, and filed his answer, in which he asserted, that he and those under whom he claimed, had paid all the taxes assessed against the property, and had exercised all RIGHTS OF OWNERSHIP and possession over said premises for nearly half a century; that the complainants and those under whom they claim, upon the other hand, had failed for nearly three- quarters of a century, to pay any attention whatever to the premises, or to the discharge of the obligations resting upon them, to pay the taxes due, and assessed by the Government, under whose protection they stood; that during all this great lapse of time, all of the officials, who might have thrown light upon the transactions involving this property, had long since disappeared from the stage of action; that the witnesses, who could have testified to the regularity of the proceedings, which led up to the sale for taxes, and the conveyance under the tax sale, had died; that the papers andrecords which might have been forthcoming, if any assault had been made upon the tax title, within a reasonable time, had been lost or destroyed by the ravages of time; that even the newspapers in which the sale was advertised, had for the most part fallen into dust, and that the whole transaction, had become so obscure, that it was impossible, for the court to ascertain with certainty and precision, the facts of the case; that in the meantime, the city of Washington had grown in population, and the property in controversy, instead of being a burden, as it had been for long years past, was at last valuable, and worth looking after, and that the complainants spying out from the records, the ancient and abandoned rights of the heirs of John Young, deceased, and desiring to speculate therein, had secured from a few of them, for a paltry consideration, a conveyance of some small interests, in the premises, and had asserted a claim of title, by the suit, while at the same

time they did not set out, how they, and their grantors, came to be so long ignorant of their rights, and how, and when, they had first come to a knowledge of the matters alleged in the bill, nor did they set out, what were the impediments, to an earlier prosecution of their claims.

Upon the issues joined upon this answer, a decree was entered on May the 5th, 1896, declaring that the bill was multifarious as to the defendant, John E. Roller, and that the complainants were *"barred by their own laches from any equitable relief against the defendant, John E. Roller,"* and this second bill of complaint, was dismissed as to him.

Subsequently, however, after the said Roller had been dismissed from the cause, and notwithstanding the fact, that the court had refused to grant any relief to the complaints against the tax deed, and other conveyances under which the said Roller claimed to be the owner of the property, and had refused to decree, that the said deeds should be delivered up and cancelled, the court went on, to appoint commissioners to make a partition of the said lots, assigning one-fifth to the heirs and devisees of James Ward Scott, and after said one-fifth had been so partitioned, and set off, for said heirs of James Ward Scott, to decree a sale of the residue.

No steps, however, were taken under said decree of sale, which bears date the 30th day of June, 1896, until June 1901, when the said property was advertised to be sold under said decree, on the 23rd day of July, 1901, and thereupon the said John E. Roller, having obtained leave to intervene in the cause filed a petition therein, in which he asserted, that he had twice appeared in that court and successfully defended his ownership, of the property aforesaid, the court having twice refused to grant the relief sought by the complainants, and the judge of said court, in the second cause, having expressly declared in the decree itself, that the complainants were barred by their great *laches*

and delay, from any relief in a court of equity against the tax title, under which the said Roller claimed the property in controversy, and to have the tax deed and those made subsequent thereto, and in connection with it,, cancelled and annulled, and in which he also averred that the court was without jurisdiction and authority, to enter the subsequent decrees and orders in the cause, and that while these said decrees were in no way binding upon him, he having been dismissed therefrom, they nevertheless tended to throw a cloud upon his title, and to embarrass him in the full use and enjoyment of the property, that a sale under said decree might still further tend to injure him, involving him in litigation, and might mislead also some innocent purchaser. He prayed the court to rehear and set aside all decrees in the cause rendered subsequent to the decree of May 5, 1896, (p. 90 P. R.), and that the cause might be finally dismissed.

The appellees claimed in an answer filed by them, that the trustee could convey a good title to the property, staking the assertion upon the certificate of a certain title and insurance company, which certificate itself showed on its face that the petitioner Roller was in possession of the property, and had gotten George R. Arrington to build a fence around the same for him after he became the owner thereof, and that he had looked after the lots from 1875 to 1887 when he became such owner and had the fence built. They claimed also that they had repeatedly offered to reimburse the said John E. Roller for all taxes and assessments paid by him, upon said land, and that he had refused to accept it, but introduced no proof whatever sustaining any such statement, while the said John E. Roller, on the other hand declared that this statement was absolutely untrue. They averred, also, that the said John E. Roller was not in possession of the property in controversy, but that one Bristow L. Walker was in such possession, under license from Leo. Simmons, the trustee.

The proofs showed that the defendant, John E. Roller, had paid about four thousand dollars ($4,000) on his purchase of the land, in the year 1887, (p62 P. R) that he had fenced the property in controversy that same year, (p. 62 P. R. and p 73, P. R.) and had held it in absolute possession up to the year 1892, when the fences were destroyed by some contractors acting under one John H. Walter, a trustee of the heirs of John Young, deceased, and that while Roller was thus in possession the first named suit was pending and decided. (p. 72, P. R.)

The cause was heard upon the petition of the said John E. Roller, the answer of Allen C. Clark, and Leo Simmons, trustee, and it was decreed by the court on the 6th of November, 1901 (p 110, P. R.), that the prayers of the petition be denied, the petition dismissed, and the rule to show cause, discharged with costs; and further, that the order to the trustee to suspend or postpone the sale of the property, be revoked.

From this decree of the 6th of November, 1904, an appeal was taken by the said John E. Roller, to the court of appeals of the District of Columbia and when the cause was decided by that court on the 4th day of February, 1903, the decree of the court below was reversed, and the cause remanded for such further proceedings in said Supreme Court of the District of Columbia, "in conformity with the opinion and decree of this court, according to right and justice and the laws of the United States ought to be had." The case has been reported and the opinions of the court, both upon the hearing and upon the rehearing are given in full.

The court in its opinion decided that the complainants were not entitled to the relief they sought, towit, the partition of said three lots, because their title thereto was not clear, but said also, as a matter of grace or favor, in a court of equity, that the proper course to be pursued was,

to suspend all proceedings in the suit for partition and give the complainants a reasonable time, to establish their title at law, if they desired so to do, or else to dismiss their bill without prejudice, leaving all parties, to pursue such remedies for the protection of their interests as they might be advised.

Whereupon the appellees, Allen C. Clark and wife, by their solicitor filed their petition to rehear said decreee of the court of appeals with the result that the decree of that court, after due consideration thereof, was affirmed.

From that decree of the court of appeals of the District of Columbia of the 20th of February 1903, neither the appellants nor the appellee, Roller, nor anybody else, has ever taken an appeal to the Supreme Court, of the United States, unless as hereinafter set forth.

When the cause went back to the Supreme Court of the District of Columbit the parties in interest, antagonistic to Roller, other than the devisees of James Ward Scott, filed with the papers what is termed in the record "election of parties in record, &c." Printed Record page 112, and thereby made their election "to stand upon the proceedings already had in the cause as they appear from the entire record of said cause." and the cause coming on to be finally heard, upon the mandate of the court of appeals, and upon this election of the parties in interest, it was adjudged, ordered, and decreed that the original and amended bills of complaint be dismissed, without prejudice, as was directed by the decree of said court of appeals, of the 20th of February, 1903.

Thereupon the complainants, Allen C. Clark and wife, and Bartow L. Walker, noted an appeal, to the supreme court of appeals, of the District of Columbia, the counsel for the appellee Roller, insisting at the time, that there could be no such a thing as an appeal from that decree, for nothing had been done in the cause, except what was done

in exact conformity with the mandate of the court of appeals.

The appeal was allowed, however, and thereupon the appellants sought to add to the former record, the deposition of Bartow L. Walker, and some exhibits, which had been left out of the record, upon the first appeal.

But upon the motion of the appellee, Roller, the deposition aforesaid, and all the other parts of the new record, except the paper No. 8 "election of parties in the record &c.," page 112 of the Printed Record—which was treated by the court, as a declination by the appellants, of the option given them by the court of appeals in its decree, was stricken out, and the decree of the court below, affirmed with costs, on the 24th of May, 1904.

From this decree—of the 24th of May, 1904,—AND NO OTHER—the appellants have sought and were allowed an appeal, to the Supreme Court of the United States.

The contention of the appellants is, that although an appeal was taken by the appellee, John E. Roller, from the decree of November 6, 1901, of the Supreme Court of the District of Columbia, in the case of Allen C. Clark and others, vs. Harriet Osburn & others and although the Court of Appeals of the District of Columbia decided the questions involved in that appeal, upon the record as then made up by the parties in interest after full argument, and careful consideration thereof, upon the merits and remanded the cause to be proceeded in, in accordance with certain directions, given in its opinion and decree, and although nothing was done in the cause, thereafter, except to dismiss the same, as required by the decree of the court of appeals, yet as that appeal had been taken from an interlocutory decree, it had in fact decided nothing, and a second appeal could be taken to the court of appeals of the District of Columbia, and then from that court to the Supreme Court

of the United States and the further contention is, that the decision and decree of the Court of Appeals of the District of Columbia, on the first appeal, is to be regarded as of no value whatever, but that the entire record can be brought up for review, on appeal for the second time, in the cause by the party who lost upon the first appeal, and that appellants can avail themselves of any error which they may find in any of the proceedings in the cause.

In view of all these contentions of the appellants, the appellee, John E. Roller, has sought and perfected, a cross appeal, so that any errors in the case, to his prejudice, may be corrected upon such cross appeal.

ASSIGNMENTS OF ERROR UPON THE CROSS APPEAL.

1. The court below erred, in not holding in positive terms, that the decrees rendered by the Supreme Court of the District of Columbia in favor of the appellant John E. Roller, the one by Judge Hagner, on the 17th of May, 1893, in Equity Cause No. 14,468, and the other by Judge Cox, on the 5th of May, 1896, in Equity Cause No. 15,141, adjudicated the title of said Roller, to the property in controversy, finally and irrevocably, and in not declaring by its decree, that these were final decrees, upon that question, as to him.

2. The court below erred in not holding that said prior decrees, did not finally adjudicate the title of said Roller, to the property in controversy, and that there could be

no further, or new contention, in regard to the same, and in failing to recite such findings, in its decree, and in leaving, the effect of these decrees, to be determined, in a new controversy, to be thereafter instituted.

While the court of appeals, granted the appellant John E. Roller, relief, which must result inevitably, in a judgment in his favor, under the decrees aforesaid, rendered by Judges Hagner, and Cox, respectively both of whom declared that the complainants were not entitled to relief, as against the tax title, held by the said John E. Roller, yet the Court of Appeals of the District of Columbia failed to declare this to be the fact in the cause before the Court, as it should have done, but referred the cause back, with instructions to give the complainants a reasonable time in which to establish their title at law, and if they should decline to do this, then to dismiss the cause, leaving all parties to pursue such remedies for the protection of their respective interests, as they might be advised.

3. The court below erred in failing to annul, all proceedings had, in the Supreme Court of the District of Columbia, subsequent to the decree rendered by Judge Cox, on the 5th day of May, 1896, and in failing to dismiss the cause, finally, from the docket.

PRELIMINARY MATTERS.

1. FIRST PRELIMINARY MATTER—The appellee, Roller, moved the court of appeals of the District of Columbia, to strike out of the record, the deposition of Bartow L. Walker—pages 13 to 28 of the Printed Record—being pages 14 to 37 of the original transcript—and it will appear in this transcript of the record from that court—pages 119 and 120 of the Printed Record,—that this motion was sustained, and that the said deposition, was stricken from the record.

It will be noted, that this deposition in the printed petition or motion, made by Mr. D. S. Mackall, as attorney for the appellee, Roller—as shown on page 116 of the Printed Record—is by mistake, called, the deposition of "John H. Walter," but the pages of the record, referred to, namely: pages 14 to 37 inclusive,—show what deposition is meant by the court, in its order striking out the same. The printed transcript of the record, in the case, when in the court of appeals of the District of Columbia, will also show, that the deposition of Bartow L. Walker, was not in that transcript, and the object of Roller's motion before that court, was, to make the record the same, that it was, when the cause was heard before it, on this first appeal.

This deposition, therefore, although copied into, and printed in the record is—as the record shows—properly no part of the record, to be considered by the court.

2. SECOND PRELIMINARY MATTER—Then first comes a most important question.

The appellants having sought and obtained an appeal to the Supreme Court of the United States, from the decree of the 24th of May, 1904—as the appeal order itself shows—on page 120 Printed Record—*does that have the effect of bringing up the entire record from the beginning for review? If it does*, then the correctness of the decree of the

of appeals, is before this court for review, not only, upon the appeal of the appellant, Allan C. Clark, and wife and Bartow L. Walker, upon the first case, before the court but upon the cross appeal of John E. Roller in the second case before this cuort.

IF IT DOES NOT, then the appeal only relates to the proceedings subsequent to the decree of the court of appeals, of the District of Columbia, of the 20th of February 1903, and the decree of the 24th of May, 1904, must be affirmed, in all respects, as simply carrying into effect, the mandate of the court, under its decree of the 20th of February, 1903.

These appeals to this court, are taken and allowed, under the provisions of section 233, of the Code of the District of Columbia which provides that

"any final judgment, or decree, of the court of appeals, may be re-examined, and affirmed, reversed, or modified, by the Supreme Court of the United States, upon writ of rror, or appeal, in all cases in which the mater in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations, as existed in cases of writs of error, on judgments, or appeals, from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety three."

Under trhe old statutes, the case of Spaulding v. Mason, 161, U. S. Rep. page 375, arose, and it was held, that if the first decree reviewed by the general term on an appeal, was merely an interlocutory one, then upon a second appeal from the final decree, of the general term, the whole record was brought up for review. The court refers among other decisions, to that of the District of Columbia vs. McBlair 124 U. S., p. 320 and an examination of that case will show that it was made to turn, upon the question whether or not, the decree of the general term, was *"final,"* in its charac-

ter, "*upon the rights of the parties, to some relief,*" which is practically what the new statute prescribes.

In McFarland vs. Brown 187, U. S. p. 245-6, it is held, "that a judgment or decree, to be final, within the meaning of that term, as used in the acts of Congress, giving this court jurisdiction, on appeals and writs of error, must terminate the litigation between the parties, on *the merits of the case,* so that if there should be an affirmance here, the court below would have nothing to do, but to execute the judgment, or decree, it had already rendered." Bostwick v. Brinkerhoff, 106 U. S. 3.

It will be necessary therefore to inquire as to what is the character of the decree of the 20th of February, 1903 —whether or not, it was a final decree, and whether or not, it was one from which the parties dissatisfied therewith, should have applied without delay, for an appeal, to the Supreme Court of the United States.

First, can the appellants, Allen C. Clark, and wife, and Bartow L. Walker, now take an appeal from the decree of May 24th, 1904, after having allowed the decree of February 20th, 1903, to stand without an appeal therefrom, for more than two years?

Second. Can the appellee, Roller, take a cross appeal from that decree of February 20,1903, to the Supreme Court of the United States—if that court did not grant him the relief to the extent, to which, as he contended, they should have gone?

It is certain, that he could have taken an appeal at any time, within the two years, but not having done so, can he now take a cross appeal, from that decree.

It is submitted that the Court of Appeals of the District of Columbia by said decree of February 20, 1903, in effect, decided the cause "upon the merits" as to the rights of the parties to relief, for it held in accordance with the decisions of this court, and especially that made

in the case of Willard vs. Willard 145 U. S. Rep. p. 120, that only those tenants in common, whose title is clear, may have partition as a matter of right, so that he may hold and enjoy, his property, severally. It held in effect that the title of the complainants, to the lots in controversy was not clear, and that they were not entitled to have a partition of the same, and while it permitted them, as a matter of grace, to suspend all proceedings, in the suit for partition, and gave them a reasonable time in which to establish their title, at law, yet it declared that if they did not choose to do this the suit for a partition should be dismissed.

As was said by the same court, in Farrow v. Bicycle Co. 18th Appeal Cases D. C., p. "the litigation had become res adjudicata and it was no longer competent for the lower court, to reopen it, for the purpose of amendment of the pleadings, introduction of new testimony, or for any other purpose. The authorities are believed to be unanimous on this point. We need only refer to the decisions of the Supreme Court of the United States in regard to it. Stewart vs. Salamon 87 U. S. 331; Humphrey v. Baker 103 U. S. 736 Southard v. Russell, 16 How. 547; Small v. Mitchel, 143 U. S. 99; In re Washington & Georgetown R. R. Co. 140 U. S. 91 Hickman v. Fort Scott, 141 U. S. 415."

As has already been seen—from that decree of the court of appeals of the District of Columbia, of the 20th of February, 1903 neither the appellants nor the appellee, Roller, nor anybody else, ever took an appeal to the Supreme court of the United States. On the contrary, when the case came up in the Supreme Court of the District of Columbia, the appellants in the present appeal made their election, "to stand upon the proceedings had in the cause,

as they appear from the entire record in said cause," and there upon, the cause coming on to be heard, upon the former record and this "election," the original and amended bills of complaint, were dismissed without prejudice, as directed by the decree, of the Court of Appeals.

There upon the complainants, Allen C. Clark and wife, and Bartow L. Walker, noted an appeal, to the Supreme Court of appeals of the District of Columbia, the counsel for the appellee, Roller, objecting to the allowance of any such appeal, and when the second appeal came before the court of appeals, the court declared that the final decree then appealed from had been entered "in direct accord with the mandate of this court." and upon simple motion, affirmed the same, upon that ground.

In Humphreys vs. Baker 103, U. S., Rep. p. 736, your honors, court after citing Stewart v. Salamon 97 . U. S. p. 361 in a case like the one before the court held as follows:

> "The decree entered below, in the present case, followed the mandate in every particular, and was in legal effect, *ours*. It commanded Humphrey to convey, and the proceedings in which the order now appealed from was entered were for the purpose of compelling him to do what we said must be done. Instead of carrying our decree into execution ourselves, we sent it below for that purpose. No discretion was given the Circuit Court as to requiring a conveyance. That was ordered here. The order appealed from was in furtherance of our express directions and may with propriety be considered part of our decree. It was the appropriate way of getting the conveyance which we said must be made. If in the end, it shall appear that Humphrey is entitled to the relief he asks, in what he denom-

inates his "bill of supplement and review," the appropriate decree to that end will be made in that proceeding. *The decree we directed is the final decree in the original suit, and the court below had nothing to do but to carry it into execution."*

It must first be determined then, whether or not the decree of the 20th of May, 1903 which was entered in the court of appeals of the District of Columbia, upon the first appeal, was a final decree of that court.

In connection with this question it should be noted, that upon the first appeal to that court, the parties plaintiff and defendant, selected such parts of the record to be copied, as they desired, and omitted having certain other parts of the record copied and brought before that court, and that the court acted upon the record as thus made up before it. It further appears that by consent of parties, another part of said record in the lower court, was made a part of the record in the court of appeals and the cause reheard upon this *new record.* If the appellants Allen C. Clark and wife and Bartow L. Walker can now take a second appeal, in the case, it is submitted that they cannot have a third and wholly different record made up and, have the court of appeals try the case anew upon this third record? The court of appeals, of the District of Columbia, after allowing them to supplement the original record, on a rehearing has decided, that they cannot make a new record and it is earnestly submitted that this decision is right and just, in every sense of the word, and it is submitted most strenuously also in conclusion on this point—that they are BOUND BY THE DECREE OF THE COURT OF APPEALS OF FEBRUARY 20th, 1903, AS REHEARD AND REAFFIRMED ON THE 6th OF MAY, 1903, AS A FINAL DECREE, FROM WHICH THEY COULD NOT ESCAPE, IN THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA, WHEN THE CASE WENT BACK TO THAT COURT, AND FROM WHICH THEY COULD NOT TAKE A SECOND APPEAL TO THE COURT OF APPEALS. BUT FROM WHICH THEY COULD ONLY HAVE TAKEN AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES.

Upon this view of the matter—the time for the appeal to this court from that of February 20th, 1903 having expired—the motion is made to affirm the decree of the 24th of May, 1904 as a matter of course.

ARGUMENT UPON THE LAW AND THE FACTS OF THE CASE.

I.

It is submitted to the court, that the decrees rendered in favor of the appellee, John E. Roller, the one by Judge Hagner, on the 17th day of May, 1893, and the other by Judge Cox on the 5th of May 1896 are final decrees, and that under the authority of Philips vs. Negley, 117, U. S. Rep. 665, and the hundreds of cases cited in 17 Amer. Encyc. of Law, p. 816, they can not be reviewed, reversed, or annulled for any errors of law or fact, on the part of the court which rendered them and the court of appeals of the District should have upheld and enforced these decrees in the present suit, and not have sent them over to a new suit or controversy for trial.

Perhaps the most eloquent statement of the rule, is to be found in the case of Crane vs. Blum, 56 Tex. Rep. 330, in which it is declared, that—

> "The good of society, and the preservation of right, and of good order, require that, when once the rights of parties have been determin-

ed, by the ultimate tribunal, provided by law, for their adjudication, the same should pass from the field of strife forever. Any other rule would fill the courts with causes, which had once been determined, and render all rights of property uncertain, and the most solemn judgments, a mockery."

The rule as laid down in this court—the Supreme Court of the United States,—is as follows:

"The general principle announced in numerous cases, is, that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties, or their privies, and even if the second suit is for a different cause of action, the right, question, or fact, once so determined, must as between the same parties, or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded, by the very object, for which civil courts have been established, which is to secure the peace and repose of society, by the settlement of matters capable of judicial determination. Its enforcement, is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked, if conclusiveness did not attend the judgment of such tribunals, in respect of all matters, properly put in issue, and actually determined by them."

See Mitchell vs. Bank, 183, U. S. 480.
S. P. R. R. Co., vs. U. S., 168, U. S. 48. and the numerous authorities cited.

II.

It is submitted also, that it is shown by the record, that not only was the defence of *laches* and abandonment, as against the assault made upon the tax title of the appellant, John E. Roller, presented to Judge Hagner in Equity cause No. 14,468 of Clark and Osburn and sustained by him in that cause, but that it was presented to Judge Cox in Equity cause No. 15,141, in which cause the present appeal is pending; and sustained by him in that cause also.

First. In Equity cause No. 14,468, the bill distinctly assailed the tax title of the apellee, John Roller, upon the ground that it was invalid and worthless because of certain defects charged in the bill, the only defect alleged however, being the failure of the officer conducting the sale for delinquent taxes, to return a report of the sale to the clerk's office of the Circuit court of the county of Washington, and the failure of the clerk of that court to record the same. The defendant, the said John E. Roller, filed a demurrer to the bill, upon two grounds, the first being that a suit for partition ought not to be maintained until the claimants of the property seeking the parition, *had made their title clear*, by an action at law, and the second, that the claimants of the property had been guilty of such *laches* and delay—more than a half a century—in making their attack upon the tax deed, under which the said Roller claimed, as to preclude them from relief.

That the defence of *laches* can be made by demurrer to a bill, has been settled by the case of Camack vs. Carpenter, 22 Wash. Law Rep. pp. 302-304.

The decree rendered by the court on the 17th of June, 1893,—now over twelve years ago—is general in its terms, sustaining the demurrer dismissing the bill and awarding the defendant Roller his costs.

This decree of Judge Hagner, of June the 17th, 1893,

was plead in the new cause No. 15,141, in bar of the prosecution of that suit, and it was proven distinctly and clearly by the testimony of the appellee John E. Roller as well as by that of his attorney, Douglas S. Mackall, that Judge Hagner based his decree, upon both grounds set up in the demurrer, sustaining the demurrer in both branches, but especially resting his decree upon the defense of *laches* presented by the second ground of demurrer. NO WITNESS ATTEMPTED TO CONTRADICT THIS TESTIMONY IN THE SLIGHTEST PARTICULAR.

The record shows, too, that when the appellee John E. Roller, wished to raise this question of *res adjudicata*, his answer was filed before and his petition to be made a defendant for the purpose of making this defense, was presented to the same Judge, (Hagner), who had rendered the decree, and that that Judge required, that the said Roller should be made a party defendant, in the second cause.

Your honors cannot doubt, therefore, that the question was presented to Judge Hagner,, and that by his decree of June 17, 1893, he decided it.

SECOND. In Equity cause No. 15,141, the amended bill made the same attack upon the tax title that was made in Equity cause No. 14,468, and the answer of the defendant, John E. Roller made the same defense, to wit: that of *laches* and the further defense of *res adjudicata*, based upon Judge Hagner's decree.

The decree of Judge Cox shows on its face not only that he decided it, but that he put it in his decree, first, that the court was without jurisdiction to entertain the suit against Roller; second that the bill was multifarious as to him; and third that the complainants were barred by their own *laches* from any equitable relief against the said defendant, and dismissed the said Roller, finally, from the cause.

It is submitted, therefore, that there cannot be a shadow

of a doubt that the question of the defense against the attack made upon the validity of the tax tittle held by the defendant John E. Roller, based upon the ground of *laches*, was sustained by the court, in both of the equity causes, No. 14,468, and No. 15,141, and that there can be no escape from this fact.

III.

As to the Effect of These Decrees.

In the case of Samuels vs. Reviere, 108 Fed. Rep. 718, the plea of *res adjudicata* was sustained in a case almost identical with that before the court. Reviere had filed his bill of equity against Samuels to cancell the deed made by the sheriff under which Samuels claimed the land. A decree was entered cancelling the deed. After the decree was entered, Samuels appealed and the decree of the lower court was reversed, and the cause remanded with instructions to dismiss the bill. When the question came up before the court as to the effect of this decree, the court said:

> "If the decree of the Circuit Court, cancelling the deed had not been reversed, it would have ended Samuel's claim to the land. It would have been as to him, in this case, *res adjudicata*, settling the invalidity of his deed to the land. The case having resulted, finally the other way, and the bill having been dismissed on the merits, it would seem just, that the decree should be equally conclusive as against Reviere that the deed was valid. It is unquestionably a general rule, that at law, or in equity, a judgment or decree is conclusive between the parties upon the matters determined. The contention of Reviere, however, is that the matter in reference to the

homestead was not determined because he did not put it in issue. The rule is that when a suit is brought for a specific purpose, as for example, a bill in equity to remove cloud from title, by cancelling an adversary conveyance—the plaintiff must assert in his cause of action, all grounds, upon which he claims, that the deed he is attacking is invalid. He must present his entire case. The decree is as conclusive, as to those matters which he should present, and withholds, as it is against those actually presented."

Citing—

Freem, on Judg. (4th Ed) 249.
Case vs. Beauregard, 101, U. S., Rep. 688.
Beloit vs. Morgan, 7 Wallace, 622, etc.

In Beloit vs. Morgan, 7 Wall, Rep. 622, it was said in speaking of the former suit, whose decree was plead as *res adjudicata*:

"The parties were identical and the title involved is the same. All the objections taken in the cause, might have been taken in that. The judgment of the court might have been invoked, upon each of them. The court had jurisdiction over the parties and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of the case, but as to all further litigation touching the same subject matter, though the *res* itself be different. The principle reaches further. It extends not only to questions of fact and law, which were decided in the former suit, but also to the grounds of recovery or defense, which might have been and were not presented."

The court quotes with approval from the important case of Henderson vs. Henderson, 3 Hare, page 45, the opinion of the court to the effect that the plea of *res adjudicata* applies to every point—not only to those, upon which the parties required the court to form an opinion, and to pronounce a judgment—but to every one, which the parties exercising due diligence, might have brought forward.

In the case of Bailey vs. Laws, 23 S. W. Rep. page 20, 3 Texas Civil App. page 529, itwas held that where in a suit *for partition certain parties were held to have no title,* it was not error to exclude as evidence in a subsequent suit, certain tax deeds, executed prior to such original judgment, under which one of the defeated parties thereto claimed title.

In Heffner vs. Insurance Co., 123, U. S. p. 747, in a case very much like that before the court, it was held, not only, that multifariousness in the bill does not render the decree void, but it was held also, that although, in decrees for foreclosure of mortgages, the holders of prior adverse titles are not proper parties, some of the judges holding that "they could not be made parties" and some holding that "their titles could not be litigated" yet that such adverse claimant, might be made a party, to the cause, and the court might determine the validity of his title, and a decree in such case, was a conclusive adjudication, of which the adverse claimant, could not complain, in any collateral proceeding.

To the like effect, is the decision of the Court of Appeals of West Virginia in the case of St. Lawrence Boom & Mfg. Co. vs. Holt 41, S. E. Rep. p. 751.

THESE CASES ARE IDENTICAL WITH THE CASE BEFORE THE COURT AND THEY SHOW CONCLUSIVELY THAT THE TWO DECREES REFERRED TO IN THIS CAUSE ARE NOT OPEN TO COLLATER-

AL ATTACK, BUT ARE FOREVER BINDING UPON ALL PARTIES IN INTEREST.

Upon these authorities it is certainly clear that if the parties to the two Equity causes Nos. 14,468, and 15,141, adverse to the tax title of John E. Roller, had succeeded in having the tax sale held invalid, and in having the tax deed and all others connected therewith delivered up and cancelled, as constituting a mere cloud upon their title the said Roller would have been forever concluded thereby.

That a court of equity had jurisdiction to cancel the tax sale, and the tax deeds, thereunder, because of its being a cloud on the title, there can be no question (see Samuels vs. Reviere, 108 Fed. Rep. p. 721) and as is said in that case, it would seem but just that the decree should be equally conclusive when the deed has been held valid, as against the other parties in interest. Upon what principle of right, canthe parties, adverse to the interest of the appellee, Roller deny, that they are estopped by the decrees rendered, just as he would have been.

Every action or suit involving the title to land, is in effect an action of trespass to try title, no matter what its form,—see Grimes vs. Hobson, 46 Texas, p. 416—and the judgment of the court is conclusive, even if the court in deciding the question, involved, decides, that it has no jurisdiction, and dismisses the suit. (84 Texas, p. 651.)

It is well settled that a court of equity in a suit to remove a cloud from the title, may bring all the parties before the court—direct that an action at law be brought, or award an issue out of chancery, and make a decree in the cause, binding all parties concerned.

See leading case of Daingerfield vs. Pascal, 20 Texas, 551.

Currin, vs. Spraull, 10 Gratt.

3 Amer. & Eng. Ency. of Law, title, Cloud upon Title.

But if your honors needed additional and perhaps more emphatic authority, you would find it in the decision of the Supreme Court of the United States in the case of Root vs. Woolworth, 150, U. S., 401, a case in which it appeared that Governor Morton had brought a suit against Root to establish his right to certain property near the city of Omaha, and to *have the claim which Root asserted thereto, declared a cloud upon his title.* The decree, established the superiority of Morton's title. Later on, Morton conveyed an undivided half interest in the premises to Woolworth, and the other half to his brother, Morton, and after his death, his executors transferred that half to Woolworth. In the meantime, Root had re-entered, or resumed possession of the premises, and Woolworth filed his bill to carry into execution the decree, which had been rendered in the first suit, in favor of Morton against Root. Root demurred to the bill, on the ground that Woolworth's remedy was at law, and the demurrer was overruled. Then he answered, and attempted to make defense, upon the ground of adverse possession, for the statutory period. The court refused to sustain this defense. The court, in its opinion, said that:

> "The jurisdiction of courts of equity to interfere, and effectuate their own decrees by injunction, or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties, is well settled."
>
> Citing Story's Eq. Jur. p. 959, and a number of other authorities, including Krippendorf vs. Hyde, 110, U. S. 276, and Pac. RR. Co., vs. Mo. P. RR. C., 111 U. S. Rep. 505.

It is certain that if the complainants had succeeded in either of the two equity causes, Nos. 14,468, or 15,141, in declaring the tax title of the defendant Roller invalid and worthless, they could have asked the court to enforce the

decree of the court to that effect, under the direct authority of the case of Root vs. Woolworth, just cited. Scant consideration would have been shown to the appellee, Roller in such a case, because he would have been in the way of the court's decree, his rights and interests in the property, would have been destroyed by the decree, and he would have been treated as a trespasser.

IT IS SUBMITTED, THAT THOSE DECREES ARE BINDING ALIKE UPON THE COMPLAINANTS AND THE DEFENDANTS, IN THOSE TWO CAUSES, AND SHOULD BE ENFORCED AGAINST THE OTHER PARTIES, ADVERSE TO ROLLER, WHO WAS THE SUCCESSFUL PARTY.

THOSE DECREES WERE OBTAINED AFTER LITIGATION IN THE COURTS OF THE DISTRICT OF COLUMBIA, THAT HAS BECOME NOTED AND IT CAN NOT BE POSSIBLE THAT NOTHING HAS BEEN ACCOMPLISHED BY THEIR RENDITION, THAT THEY ARE MEANINGLESS AND THAT THE QUESTIONS, THAT WERE THOUGHT TO BE SETTLED BY THEM, CAN BE RE-LITIGATED AGAIN, AND AGAIN.

IV.

It is true that after the rendition of the decree, in Equity cause No. 15,141, dismissing the defendant, Roller, from the cause and making a final decree as to him—indorsed as a final decree by the judge of the court himself—yet that the court, some time afterwards, went further to appoint commissioners to make a partition of the lots involved in said causes, and later on, to enter a decree for the sale of the property in controversy, and it is claimed that some consideration is to be paid to these decrees.

These decrees were entered without controversy, because there was no one to oppose them and they may have

been entered as a matter of course, being proper in form and unobjected to. Whether the learned judge understood that it was the same case, in which he had held that the complainants were not entitled to a cancellation of the tax title, including the tax deed, and all other deeds connected therewith, which the complainants themselves, said was a cloud upon their title, does not appear. If it had so appeared, he perhaps would not have entered the decrees, for in the case of Willard vs. Willard, 145 U. S. Rep. 116 the court had held that in the partition of real estate in the District of Columbia,the title must be clear, to entitle the tenant in common to partition as a matter of right. See page 120 and authorities there cited. See, also, 2 Minor's Inst., title "Partition," and numerous authorities there cited.

But in addition to these authorities the record shows that in the final decree of June 17, 1893, in Equity cause No. 13,468, Judge Hagner decided—sustaining the defendant, Roller's first ground or demurrur—that a court of equity could not make partition of the real estate in controversy in that cause, until the title thereto, had been made clear, in said court of law, and that he put that finding in the decree itself.

THAT DECREE STANDS TODAY UNREVERSED AND IN FULL FORCE AND IS THE LAW OF THE LAND AS TO THE PROPERTY IN CONTROVERSY.

It appears, too, that the court of appeals of the District of Columbia was of the opinion that those decrees were rendered after Roller was dismissed from the cause, and that they were not binding upon him, because as to him, they were *coram non judice*, and as to this there can be no question.

It is submitted to your honors, therefore, with confidence, that the decree of the court of appeals of the District of Columbia was erroneous in failing to say in express

terms, that those decrees, as shown on the face of the decrees themselves, and by the proofs adduced, under the authority of Russell vs. Place, 94. U. S. Rep. 606, (establishing by intrinsic evidence that the question was raised and determined), sustained the validity of the tax title under which the appellee, Roller, claims, as unassailable, because of the lapse of time, the loss of evidence and the *laches* of the adverse claimants for more than half a century; and in not at once enforcing that finding in the present suit.

V.

It is submitted with confidence, that the court of Appeals of the District of Columbia should have decided as did Judge Hagner and Judge Cox, THAT THE FAILURE FOR OVER THREE QUARTERS OF A CENTURY, TO PAY TAXES, ON THE PART OF THE ALLEGED OWNERS, AND THE FAILURE FOR NEARLY A HALF A CENTURY, TO QUESTION THE VALIDITY OF THE TAX TITLE O FHE APPELLEE, ROLLER, IS SUCH EVIDENCE OF AN ABANDONMENT OF ANY CLAIM TO, OR RIGHT IN, THE PROPERTY, AND OF SUCH LACHES AND DELAY, ON THE PART OF SAID OWNERS AS TO PRECLUDE THEM FROM EVER OBTAINING ANY RELIEF WHATEVER AGAINST THE TAX TITLE, UNDER WHICH ROLLER CLAIMS AND CONSEQUENTLY FROM EVER ASSERTING ANY TITLE TO THE PROPERTY WHATEVER.

The answers filed in the cause, admit that the appellee Roller, and those under whom he claims, have paid the taxes and they pretend to say that the claimants have offered to reimburse him the taxes and assessments against the property, but they utterly failed to renew the offer in the answers and they neither brought the money into court nor

offered to pay it, and the pretense of such offer is emphatically denied.

IF INTEREST BE COUNTED UPON THESE TAXES AND ASSESSMENTS, IT IS BELIEVED, THAT THEY WILL FAR MORE THAN ABSORB THE VALUE OF THE PROPERTY.

The appellee, Roller, denies that the offer was ever made, but declares, that if it was, it can not affect the controversy here. He submits that, having paid for the property, in good faith, that he and those under whom he claims, having paid the taxes on it for over three quarters of a century, having successfully defended the property against all comers to this date, and successfully invoked the defense of *laches*, against the attack made upon the tax title, under which he claims he is entitled at the hands of your honors to that consideration which a law abiding and taxpaying citizen is entitled to receive.

That a defence, based upon the ground of *laches* and abandonment, is one which will be recognized and allowed by the courts, both of law and equity, is a proposition which is sustained by numerous and well considered decisions of the courts, throughout the whole land.

The first case, perhaps, in which this doctrine was announced is that of Ewing vs. Burnett 11 Peter's Rep. 41, in which it was said that—

> "On the evidence in the cause, the jury might have presumed a release, a conveyance, or an abandonment of the claim or right of Williams under a deed in virtue of which he had made no assertion of right in favor of a possession such as the defendant had from 1804, although it may not have been strictly such an adverse possession as would have been a legal bar, under the act of limitations."

In that case, the time during which Williams did not "claim the lot or assert a right to it," was only "from 1803 till his death in 1824," while the time during which the defendant claimed the lot under color of title was from 1804 to 1834; while he paid taxes on it only from 1810 to 1834. (See pages 49 and 51.)

It was held, also, in that case—

> "that the uninterrupted payment of taxes taxes on the land for more than twenty four successive years is powerful evidence of a claim of right to it."

How much stronger is the case presented in the record now before the court.

The latest case, in the Supreme Court of the United States, is that of Moran vs. Horsky, 178, U. S. Rep. 208, in which case, an abandonment for fourteen years was considered sufficient to bar any claim for relief, the court declaring, that—

> "we need only refer to the many cases, decided in this court and elsewhere, that a neglected right, if neglected too long, must be treated as an *abandoned* right, which no court will enforce. There always comes a time when the best of rights will by reason of neglect pass beyond the protecting reach of the hands of equiy."

The court refers to Galliher v Caldwell 145, U. S. Rep. 368, in which case the land in controversy lay near the city of Tacoma, in the State of Washington. The claimant lived but forty miles from the land, and was presumed to have known something of the changes, going on around it. It lay contiguous to a city, beginning to grow rapidly in value, and it was platted as an addition to that city. The city had grown from a population of 1,000 in 1880, to a population of 36,000 in 1890, and that implied an enormous increase in property situated so as to be an addition to the city. The claimant waited but seven years, and only four

years after the issuance of a patent to another claimant. The court below applied the defence of *laches* to her claim, and the Supreme Court of the United States unanimously sustained the decree.

On page 372 the court, in its opinion, referred to a number of cases in which this defense was applied. In Harvard vs. Railroad Co., 17 Wall. 78, after a delay of five years; in Twinlick Oil Co., vs. Marbury, 91 U. S. Rep. 587, after a delay offouryears; in Brown vs. County of Beuna Vista, 95 U. S. Rep. 157 after a delay of seven years; in Hayward vs. Bank, 96 U. S. Rep. 611, after a delay of four years; in Holgate vs. Eaton, 116 U. S. Rep. 33, after a delay of two years in Davis vs. Davis, 125, U. S. Rep. 90, after a delay of five years

The court said:

> "But it is unnecessary to multiply cases. They all proceed upon the theory that *laches* is not, like limitations, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced; an inequity founded upon some change in the relation or condition of the property or the parties."

In Hammond vs. Hopkins, 143, U. S. 224, which was a case involving title to real estate in the city of Washington, and in which it appeared that there had been great changes in value and testimony had been lost, owing to the death of witnesses and loss of papers and there was an absence of any reasonable impediment or hindrance to the assertion of the alleged right, the court held:

> "A court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands for the peace of society, and will refuse to interfere, where there

> have been gross *laches* in prosecuting rights, OR WHERE LONG ACQUIESCENCE IN THE ASSERTION OF ADVERSE RIGHTS HAS OCCURRED."

In Naddo vs. Burden, 4 U. S. Appeals, 642, the real estate involved lay near the city of Duluth; the rapid increase in the population of that city made it evident that the land in controversy must have wonderfully increased in value, and the court took judicial notice of the fact. In that cause after a delay of ten years, the court declared that the claimant had been guilty of such *laches* as would bar him from relief.

Justice Brewer delivering the opinion of the court in the case, declared:

> "No doctrine is so wholesome, when wisely administered, as that of *laches*. It prevents the resurrection of stale titles, and forbids the spying out from the records, of ancient and abandoned rights. It requires of every owner that he take care of his property, and of every claimant that he make known his claim. It gives to the actual and long possessor, security, and induces and justifies him, in his efforts to improve and make valuable his property. It is a doctrine received with favor because its proper application works out justice and equity and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it, when its enforcement will work large injury to many."

The court quotes the case of McQuiddy vs. Ware, 20 Wall. 14, in which there was a delay for six years only on the part of the claimant, who insisted that judicial proceedings had against him during the war, while he was at the time in the Confederate States, were invalid, and ineffectual

as to him, and yet the delay, unexplained, was held sufficient to deny him the aid of the court of equity.

The courts have leaned, too, in aid and support of tax title, *such as this, involved in the present case.*

In Thompson vs. Carroll, 22 How. 422, it was held that where the owner of a tax title, has had possession of the property in controversy, paid taxes, built and made valuable improvements on the same, for nearly twenty years, a court of justice should not exercise judicial ingenuity, to forfeit even a tax title, when the former owners have been slow to question its validity.

In Cornet vs. Williams, 20 Wallace, 230, the Supreme Court of the United States declared that:

> "As regards public officers, acts done which presuppose the existence of other acts to make them legal and operative, are presumptive proof of the latter. In the case of Ward's Lessee vs. Barrows 2 Ohio, St. Rep. 247, a sale for taxes came under examination. It was held, that certain acts of the county auditor, were presumptive proof that he had administered to the collector the oath prescribed by law, touching the delinquent list. The sale was sustained. The judge who made the order of sale, was the judge to approve the claim. The order was presumptive proof, of the requisite approval."

In the case of Keene vs. Demarest, 21 Calif. Rep. 300, it was held that an assessment could not be presumed nor could a tax deed itself, be presumed, but that the presumptions of law, which Greenleaf says, applies to all sales, or other official procedure, after the lapse of thirty years did apply, to all the intermediate steps between the assessment and the tax deed, and that the presumption was, that the requirements of law had been complied with, after a reason-

able lapse of time had taken place, so that a fair presumption had arisen, that there had been some loss of papers, records or other evidence, quoting the doctrine as laid down in 1 Greenleaf on Evidence, p. 19 and 20, fixing the period of time which must have elapsed in most cases "at thirty years."

The failure on the part of the owner to pay the taxes assessed against the property, and the payment of the same by the claimant, asserting title thereto, and in whose name also, the real estate had been assessed for a long period of time, is powerful evidence of a claim of right to the property.

See Fletcher, 120 U. S. 553.
Ewing vs. Burnett, 11 Peters, 41.

The supreme Court of the United States has said also.

> "that the payment of taxes, is an important and strong evidence, of a claim of title, and the failure of the record owner, to make claim to the property, or to pay the taxes themselves, is evidence of an abandonment of any right in or claim to the property."

See Holtzman vs. Douglas, U. S. Sup. Court, 166, U. S., Report278.

In this case of Holtzman against Douglas, such payment of taxes by a claimant under a tax title only continued from 1867 to the 31st of May, 1879.

In the case at bar the alleged owners have failed for over three quarters of a century to pay any taxes on the property in controversy, and there can not be any question about the fact that they had abandoned the property to the appellant, Roller, and those under whom he claimed.

In Underwood vs. Dugan, 130, U. S. 284, in applying the doctrine of *laches* in that case, the court said:

> "The doctrine of *laches* rests on no arbitrary or technical rule. It is founded on the

plainest principles of substantial justice. Ownership of property implies two things: First, attention to it; second, a discharge of all obligations by taxation or otherwise, to the the state which protects it. When it appears that one who now asserts title to the property arising more than the lifetime of a generation ago, has during all these years, neglected the property and made no claim of title thereto, the reasonable presumption is that no title was in fact obtained, or, if that be not true, that he considered the property of such little value that he abandoned it to the State which protected it. So, if the title being beyond challenge, during these years he paid no taxes thereon, makes no effort to improve or increase its value, and, by the labor and efforts of others, under the protecting power of the State, large value has been given to it, the State may properly say to him as may also the individuals who have thus wrought this change in value, you abandoned the property when it was comparatively valueless, you have taken no share in the burdens of taxation, or the support of the State; others have toiled, paid taxes and made the property valuable; therefore, because of your shirking of duties and obligations, you shall not, whatever may have been the nature of your title in the first instance, be permitted to appropriate the value thus produced by others."

See also the very recent case of Patterson vs. Hewitt, 195. U. S. Rep. 317.

In the case before thecourt, after the lapse of over 80 years, under the circumstances, already set forth in the

first part of this brief, to which the courts attention is again called most earnestly the doctrines of laches, of abandonment, of want of equity in view of the changed condition of the property involved and of the parties asserting title to the same, and the loss of evidence are all pressed upon this court, in this case— which, it is submitted is the strongest case that was ever presented, for their application.

VI.

But a still further question arises, as an obstacle, in the path of the appellants, Clark and wife, and Walker. Not only must the question be answered, "Can the attack which is made after the lapse of so many years upon the tax title of the 6th of March, 1852, be sustained," but the still more significant question, "IS IT WELL FOUNDED?"

The only point which is made in the amended bill of complaint, filed in the cause against the validity of the tax title is that

> "The officer or officers of the corporation of the City of Washington did not within ten days after the supposed sale of said lot for taxes or at any time transmit to the clerk of the late Circuit Court of the District of Columbia, an accurate report, or any report in writing, certified by the clerk or register of the said corporation in manner and form, as required by sec. 2, of act of Congress approved February 20th, 1819, nor was such report, or any report, in the premises forthwith, or at any time, recorded by the said clerk, or by any one else among the land records of said county."

It is admitted that under a decision of the former supreme court of the District of Columbia reported in one of Mackey Reports, it was said, that inasmuch as no report of tax sales could be found in the office of the recorder of deeds; and in as much as the statute, as it then appeared in the compilation of the statutes supposed to be in force in the District, required that such reports should be made to, and recorded in said recorders office, the tax deed in that case was invalid. Yet a reference to the cases in the Supreme Court of the United States will show that the decision referred to, has no application to the deed to Richard Barry of March 6th, 1832, in the present case, but that deed, must be governed by the law, as it stood, "in ye old time."

The cases in your honors Court involving the validity of tax titles, in the District of Columbia were

1. Mason vs. Pearson, 9th Howard, page 232.
2. Early vs. Howard, 16th Howard, page 610.
3. Thomas vs. Carroll, 22 Howard, page 622.
4. Ronkendorf, vs. Taylor 4th Peters, 349.

and they all show that although "there were giants in those days." who appeared as lawyers in these cases, no question was ever raised by them as to the REPORT OF SALES NOT BEING RETURNED TO THE RECORDER'S OFFICE, nor was any reference made to such requirement of the court, although in the case of Thompson vs. Carroll the tax title was sustained.

It is submitted that there was then, in fact, no law requiring such report to be made to the recorder's office, and there was then in fact no such officers, as former tax laws of 1819, recognized and referred to.

The City of Washington was by the act of May 4, 1812, amending the preceding acts—May 3, 1802 chapter 53 and February 24, 1804. chapter 14, and May 4, 1812., chapter 75 incorporated, by the name and style of "the mayor,

alderman, and common council of the city of Washington." (2 U. S. Stats. at Large, pp. 721, 727. ch. 1, 9.

The corporation was given full power to lay and collect taxes, and unimproved lots in the city of Washington on which two year's taxes remained due and unpaid, etc., were authorized to be sold at public sale for such taxes due thereon (id. 8). By an amendatory act Congress enacted "that the several collectors of the said taxes, or such other officers of the said corporation, as shall be charged with the duty of selling any such real estate, for taxes, shall within ten days after every such sale, transmit to the clerk of the circuit court for the county of Washington, an accurate report in writing certified by the clerk, or register of thesaid corporation, containing &c.," (certain specified information), "which report it shall be the duty of the clerk of the said court forthwith to record, &c."

Act of February 20, 1819, ch. 35, 2.
3 U. S. Stats. at Large, p. 486.

It is claimed by the appellants Allen C. Clark and wife, in their amended bill, in the court below, that no such report was ever transmitted, filed, or recorded, and they claim, that that omission, rndered the tax title, void.

It will appear however, that the act requiring such a report to be made to that office had been repealed long before and was not in force when the tax sale in the case at bar, took place.

About a year after the passage the act of February 20, 1819, Congress repealed the then existing act, incorporating the city of Washington, and all the supplements and amendments to the same, and incorporated the said city under the new name of the "mayor, and *boardof Aldermen*, and*board of common council*, of the city of Washington." giving the new corporation, an entirely new and complete charter, with full and ample powers of all kinds, including the power to lay and collect taxes, and to sell real property,

whether improved or unimproved, in the city of Washington on which two or more year's taxes should have remained due and unpaid, &c., but requiring no such report to be transmitted or certified or recorded. (Act of May 15, 1820, ch. 104, 1, 2, 7, and 10. of U. S. Stats at Large pp. 583, 586, and 587).

Lastly Congres passed the act of May 26, 1824, which did not require any report to be transmitted, certified or recorded but repealed in section 1 "so much of the act of May 15, 1820, chapter 104, as is inconsistent with the provisions of this act." and enacted:

Sec. 3. "That public notice of the times and place ,of the sale of all real property for taxes due the corporation of the city of Washington,, shall be given in all cases hereafter, by advertisement, inserted in some newspaper, published in the said city, once a wek, for at least twelve successive weeks, in which advertisement shall be stated the number of the square, or squares, the number of the lot, or lots, (if the square has been divided in lots) the name or names of the person, or persons, to whom the same may be assessed on the books of the corporation, at the time of such advertisement, the amount of the tax due on each square, or lot, the period for which the same shall be due, and the aggregate amount of taxes, due on all real property assessed in the name of the same person, or persons, &c., and no sale of real property, for taxes, hereafter made, shall be impaired, or void, by reason of such property not being assessed or advertised, in the NAME, or NAMES of THE LAWFUL OWNER or OWNERS, THEREOF, PROVIDED thesame shall be advertised as above, directed, or by reason of the amount of taxes due thereon, not being correctly stated."

Sec. 6. "That the proprietor or proprietors of lots, which may be sold, under the provisions of this act, shall be allowed the right of redemption in the same manner, and

according to the like restrictions, contained in the act, to which this is a supplement."

Sec. 8. "That if, before the day of sale, advertised as aforesaid, the owners, his agent, or attorney, shall not pay theamount of taxes, with all costs thereon assessed, said lots, &c., shall be sold, &c., and if at the expiration of twelve months from the day of sale, the owner shall not appear, and pay, &c., the amount of the purchase money, and costs and taxes accruing subsequent to the sale and ten per centum interest, per annum, on the purchase money, it shall and may be lawful for a title in fee simple, at the expiration of said time, to be made to the purchaser."

Sec. 11. "That all titles to property conveyed as aforesaid, on sales for taxes, &c., &c., shall be by deed from the mayor, under the seal of thecorporation; which said conveyance shall be effectual, in law, to convey the title, the requisitions of this act, having been compiled with."

Act of May 26, ch 195, 1, 2, and 11.

4 U. S. Stats at Large pp. 75, 76, and 77.

We respectfully submit that, the old corporation and its officers, designated in the act of February 20, 1819, having been legislated out of existence, there was no one to whom to transmit, or certify the report provided for, by that act, and no clerk or register by whom it could be recorded and further, that even if such was not the case, the act of May 26, 1824, supra, by its broad provisions, did away with the necessity or transmitting, certifying, or recording any such report, and, in fact, repealed the act of February 20, if it had not been previously repealed, as it is submitted, it had.

It appears, however, that such reports of sale were in fact made and they were returned to the register of the District. (See Mason vs. Fearson, 9th Howard, 248) and were recorded in the official "sales book," a book kept for that purpose and that book should be in existence today in the

proper office and not only, is ths the fact but in the case of Thompson vs. Carroll, 22nd Howard, page 422, with those same great lawyers before the Court a tax sale made in 1835, was sustained, which never could have been done if the court had not thought or held, that the making of the report to the Register, and the record thereof, in the "official sales book" was a compliance with the law.

Upon these authorities it is submitted that the tax deed to Richard Barry is a valid deed—and that it should have been so held in all the courts below—upon the following grounds to wit: First: These lands were assessed for taxes—the assessment books should easily be found in the Collector's office—Second: They were duly advertised for the failure to pay taxes—"the "National Intelligencer," to be found in the room next to the law library, of the Bar Association of the District of Columbia, from July to December, 1847, no doubt shows an advertisement for 184 days; and that the dollar mark was used; and as to the only defect pointed out made against the tax title the "official sales book" which should be in existence in the Collector's Office would show that the sale was reported to the Register of the City in place of the "clerk of the Circuit Court of Washington," which office had been legislated out of existence by the act of 1824 and that this report which was recorded in the official sales book was deemed by this court to be a sufficient compliance with the law inasmuch as it appears that it has sustained a similar tax sale.
it appears that it has sustained such a tax sale.

Surely this court will not overturn its own decisions which have been acquiesced in as the law of the land, for these many years, at the suggestion of the appellants everyone of whom had no interest in the proprietary title, until they bought up the same and with full knowledge of the condition of the title,—after spying out the same— from the records and who have used the title thus acquired by

them as a basis for the institution of their suit and who may be justly charged therefore, as being mere speculators in these old titles. Surely no lawyer of later days will persuade your honor to hold that there has been a fatal defect in complying with the law of tax sales, in the District of Columbia when the great lawyers of former days—men of the greatest skill and learning in their profession, and of the highest character for integrity and honor—failed to discover or to rely upon such defect, and the court has sustained such a tax sale.

VII.

But as a final consideration in favor of the appellee, John E. Roller, which will compel your honors to hold that his title to the property in controversy is valid and unassailable. and that any decree to make partition of thesame, is a cloud upon his title, indefeasible as it has now become, your honors are refered to section 999, of the Code of Law for the District of Columbia, p. 178, Title—

> "Adverse Possession.—In an action to recover vacant and unimproved lots of ground it shall not be necessary, in order to maintain the defense of adversary possession to show that the premises in controversy had been inclosed; but if it appears that the property had been assessed for taxation to the defendant, or those under whom he claims and he or they had regularly paid the taxes on the same and were the only persons who had exercised control over the same for a period of fifteen years before the bringing of the action, such facts shall be the equivalent of possession by actual inclosure."

It is submitted to your honor, upon the merits under the proofs in the cause, that thetitle of the appellee, John E. Roller, to the lots in controversy ,is perfect and unassailable, and that a decree should be rendered to that effect, thus ending forever this protracted litigation.

1st. Under the tax title now a half a century old the defense of which has been successfully made in the court below, in both of the equity causes above referred to.

2nd. Under the law of tax sales, in force in the District of Columbiafi at the time of said sale in compliance with which that tax title was made and under which is a valid and perfect one as against the only defect alleged against it as the bills of complaint filed in this cause.

3rd. Under the doctrine of *laches* and abandonment, so often sustained by the courts against the record owner, in favor of those who have claimed the property, either under a tax title, or some other claim of title and who have borne the heavy burthen of taxation and ownership, for many years.

4th. Under the law of adverse possession, as defined and limited in the new Code of the District of Columbia, Sec. 999, cited above, and the proofs adduced in the record, which show a payment of taxes not for fifteen years, but for fifty, and a control exercised over the property in controversy for the same period, or as proven by Roller himself. since 1875

And that being so all the other decrees of the courts below, must be reversed, the decrees of June 17, 1893, and May 5, 1896, enforced, any further proceedings to partition said property, as between the parties to the Cause No. 15,-141, other than said Roller, forever enjoined, and the appellee Roller, quieted in his possession and ownership of the same.

In brief, your honors are asked to put an end to this

protracted litigation as a matter of simple justice to appellee.

O. B. Roller,
D. S. Mackall.
For Appellant.

Supreme Court of the United States.

Nos. 72 and 451.—October Term, 1905.

No. 72. Allen C. Clark, Sarah P. Clark, his wife, and Barton L. Walker, Appellants,
vs.
John E. Keller, Intervenor.

No. 451. John E. Keller, Intervenor, Appellant,
vs.
Allen C. Clark, Sarah P. Clark and Barton L. Walker.

Appeals from the Court of Appeals of the District of Columbia.

[December 4, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree dismissing a bill brought by the Clarks for partition of certain land in the District of Columbia, and a cross appeal by Keller, to protect his rights in case the whole record should be held to be brought up by the appeal. A short history of the case is necessary to make the questions intelligible. The bill was filed on November 24, 1903. On January 30, 1904, Keller petitioned to be made a party on the ground that he claimed the title, and two days later his petition was granted. On February 13 he answered, setting up a tax title in himself and the exercise of all rights of ownership and possession for nearly half a century, and also a previous decree between the parties. By a supplemental bill the plaintiffs alleged defects in the tax title and prayed that it might be declared void. The previous decree referred to was rendered in an earlier suit, which was like the present, except that it made Keller a party. In that suit Keller demurred on the grounds of laches and that the bill ought not to be maintained until the plaintiffs had established their title at law, and the bill was dismissed as against Keller in general terms. There was testimony that the judge stated that he dismissed the bill for laches and on the other grounds set up.

On May 5, 1904, the present bill was dismissed as to Keller, on the grounds that the Court had no jurisdiction as against him, that the bill was made multifarious by joining him, and that the plaintiffs were barred from equitable relief against him by laches. The next day the Court ordered partition and appointed commissioners. The same month Keller entered an appeal from these decrees, which, however, was dismissed on

October 24, 1898, for failure to give security for costs. On May 29, 1896, the commissioners made return, and on June 30, 1896, their report was confirmed. A conveyance of a part of the property was ordered, and a sale of the rest. It was further ordered that, on a ratification of the sale by the Court and payment, the purchase money should be brought into Court to be disposed of under its direction. A sale was not advertised until June, 1901. On July 26, 1901, Roller made a new application to come in, on the ground that the proceedings should have stopped after the decision and decree as to him, that he was in possession, and that the sale had not taken place, and if it did would be a cloud upon his title. On September 9, 1901, answers were filed to this petition, denying Roller' title and possession, and setting up that the possession was in one of the defendants in partition, and that the matters alleged had been adjudicated by the decrees in the cause. On November 6, of the same year, Roller's new petition was denied by the Supreme Court. He appealed, and in 1902, the mandate being filed on February 20, 1903, the decree of the Supreme Court was reversed by the Court of Appeals of the District, and the cause was remanded for further proceedings not inconsistent with the opinion of the Court. The opinion is reported 19 App. D. C. 539.

In that opinion it was stated that the proper course was to suspend proceedings under the bill in order to give the complainants reasonable time to establish their title at law. An application for rehearing was denied, and it was stated that the plaintiffs virtually conceded that the decree of partition was at least premature, but relied on the ground that it became final at the expiration of the term at which it was rendered. The plaintiffs, on November 27, 1903, filed a paper alleging that they were in possession and that the matter was adjudicated as against Roller, and stood upon the record. Thereupon, on January 6, 1904, a final decree was entered by the Supreme Court, dismissing the bill without prejudice. This was affirmed by the Court of Appeals on May 24, 1904. From the latter decree the parties have taken the present appeals. It will be seen from what had preceded that the bill was dismissed because the plaintiffs, by their election of November 27, 1903, had declined to accept the suggested suspension of the bill and to proceed at law. The question is whether, generally, and specially in the stage the case had reached, the condition attached to further proceeding with this cause was right.

A preliminary question is raised by the defendant Roller, who argues that the previous decree of the Court of Appeals reversing the denial of his petition to come into the case a second time was a final decree and settled the merits of the case. No doubt it did pass upon the merits as we have explained, but it was not a final decree. It contemplated and required further proceedings, and not until the plaintiffs had elected to stand upon the record could it be known what those proceedings would be.

Only then was it determined that the bill should be dismissed rather than suspended with a possibility that after a suit at law the partition might go on.

It was adjudicated in the other suit that the plaintiffs were not entitled to have Roller's claims disposed of summarily as an incident to a suit for partition, and therefore they cannot be heard to maintain in this suit that those claims are absurd. Indeed, whatever may be the final result, it is obvious that Roller shows a good deal more than a naked averment of title. That he holds under a tax sale is not disputed, although it is argued that the sale was void. He kept the land fenced from shortly after his purchase in 1887 into 1892, and he sets up that his possession continued when the suit was brought. He paid the taxes on the land, except for one year, and he says that the payment for that year was omitted by oversight. So far as general principles go we certainly should not reverse the decision of the Court of Appeals that the petitioners ought to establish their title at law before partition should be decreed. *Wilkin* v. *Wilkin*, 1 Johns Ch. 111. *Giffard* v. *Williams*, L. R. 5 Ch. 546. "A bill for partition cannot be made the means of trying a disputed title." *Bolton* v. *Bolton*, L. R. 7 Eq. 298a, 300. *Potter* v. *Waller*, 2 De G. & Sm. 410, 417.

It would seem from what we have quoted that this was pretty nearly admitted before the Court of Appeals, but it was and is argued that the point was not open. It is said in the first place that when the bill was dismissed as against Roller, on May 5, 1896, that was a final decree as to him, and that he could not be heard later in this Court. No doubt the decree was final as to what it decided, and he is not likely to quarrel with it. But it would be an extraordinary result of a decision that nothing could be done to a party's prejudice in a suit, if it were held to preclude him from reappearing at a later stage to protest when the Court was about to cast a cloud upon his title. If later unexpected features arose, we see nothing in the dismissal of the bill as against Roller to prevent his again being heard. That dismissal gave him a right to expect that a sale of property to which he was recognized as having a colorable claim would not be ordered until the title of the plaintiffs was made good. Even if he properly should have been allowed to remain a party to the bill in order to make sure that no decree should be made prejudicial to his rights, as to which we need not express an opinion, the dismissal of him from the suit, on the ground that no such decree could be made, cannot be turned into a weapon against him to prevent his objecting to the decree when it is made in fact.

It is argued further that the decree of June 30, 1896, confirming the commissioners' report, was final. But this cannot be so. The set off of a parcel to certain parties was part of a scheme of division by which other rties were to be paid in money, and those to whom the land was set off

were to receive a small additional sum. The whole plan, therefore, was dependent upon a sale of the remaining land, which had not taken place, and which required the confirmation of the Court. If the sale produced a much smaller sum than expected, the set off necessarily would fail, and a new order would be required. The whole matter was *in fieri*, and subject to change if for any reason it became necessary or desirable to change the plan. See *Iowa* v. *Illinois*, 151 U. S. 238; *McGourkey* v. *Toledo & Ohio Central Ry. Co.*, 146 U. S. 536; *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91. In *Willard* v. *Willard*, 145 U. S. 116, it is true, an appeal was entertained from a general decree of sale for partition. The question whether the decree was final was not considered, but there there was no such element of uncertainty in the scheme as in the present. Whatever the result of this sale it was the proper means of division and was to take place in any event.

The argument took a wider range than the matters which we have discussed, but we deem nothing further material for the decision of the case. The defendant Roller seeks to have us now consider his title and declare it good. But it is obvious that he gets all that he can hope for by his intervention when partition is postponed to a trial at law. With regard to the plaintiffs' contention that they are in possession, if they desire to rest on that they can. If they prefer to sue and to settle the matter, it is not likely that Roller will deny the possession which in this case he affirms. But to secure the plaintiffs' rights the decree may be modified so as to allow them a reasonable time to sue, the bill to be dismissed unless they do so, and it may be made a condition of the decree that in case a suit is brought Roller shall admit that he is in possession as he now avers.

Decree modified and affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.